STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**:**	
On Its Own Motion	**:**	
-vs-	**:**	
Illinois Bell Telephone Company	**:**	**08-0569**
	:	
Investigation of specified tariffs declaring	**:**	
certain services to be competitive	**:**	
telecommunications services	**:**	

PROPOSED ORDER ON REHEARING

Dated: October 30, 2009

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I. INTRODUCTION AND HISTORY OF the PROCEEDING

This proceeding was initiated by the Commission pursuant to Section 13-502 of the Illinois Public Utilities Act ("PUA") for the purpose of investigating the propriety of the competitive classification of the residential local exchange service offered by Illinois Bell Telephone Company ("AT&T Illinois") in the Greater Illinois LATAs[1]. In its final Order, dated June 11, 2009, as amended by the Amendatory Order dated June 24, 2009 (collectively, the "Order"), the Commission found that the competitive classification of that service, whether offered at package prices or on a measured rate basis, is proper. Among other provisions, the Order also included requirements that AT&T Illinois expand the number of wire centers with DSL Internet service to 99% of the Company's wire centers in the Greater Illinois LATAs and make DSL available to 90% of the total living units in that territory. These requirements are collectively referred to herein as the "DSL Internet Requirements."

On July 10, 2009, AT&T Illinois filed an Application for Rehearing requesting that the Commission reconsider and/or grant rehearing with respect to the DSL Internet Requirements. As grounds for this request, AT&T Illinois asserted that those requirements are (i) unsupported by any evidence on the record and violative of AT&T Illinois' due process rights; (ii) unsupported by adequate findings on analysis and directly contrary to the *Order*'s findings in support of the competitive classification; (iii) beyond the Commission jurisdiction and authority under state law; and (iv) preempted by well-established federal law. The Commission granted AT&T Illinois' Application for Rehearing on July 29, 2009.

[1] This proceeding involves six LATAs (or MSAs): LATA 2 - Rockford, LATA 3 – Davenport, LATA 6- Peoria, LATA 7 - Champaign LATA 9 - Springfield, and LATA 15- St. Louis. These areas are collectively referred to as the "Greater Illinois MSAs" throughout this brief.

A pre-hearing conference was held at the Commission's Chicago office on August 5, 2009, for the purpose of establishing a schedule for the rehearing proceeding. In accordance with the schedule established at the pre-hearing conference, AT&T Illinois filed it initial brief on rehearing, along with the supporting affidavit of W. Karl Wardin, on August 21, 2009. On September 18, 2009, briefs in response to AT&T Illinois' initial brief on rehearing were filed by the Staff of the Commission ("Staff"), the Illinois Attorney General (the "Attorney General") and the Citizens Utility Board ("CUB"). On October 2, 2009, AT&T Illinois filed a reply brief on rehearing, along with the supporting reply affidavit of Mr.Wardin.

II. POSITION OF AT&T ILLINOIS

A. AVAILABILITY OF BROADBAND INTERNET SERVICE

AT&T Illinois emphasized that, as a matter of public policy, it fully supports making high speed (or "broadband") Internet service widely available to residential customers throughout its service territory, including the Greater Illinois LATAs, using technologies that make economic sense. In this regard, AT&T Illinois asserted, customers throughout the Greater Illinois LATAs already have a variety of broadband Internet access services available to them from both AT&T and alternative broadband Internet access providers. According to AT&T Illinois, in every wire center where AT&T has not deployed wireline, broadband Internet access service, there is at least one cable company offering such a service. There are also satellite, wireless and/or Wi-Fi broadband Internet access service alternatives available in virtually all of these wire centers. In addition, there are currently initiatives underway at both the state and federal levels to identify and fund projects for extending broadband Internet access service to areas in the United States (including Illinois) that may currently be underserved.

AT&T Illinois further stated that, in compliance with a voluntary commitment made as part of the Federal Communications Commission's ("FCC") Order approving the AT&T/BellSouth merger, AT&T itself already offers broadband Internet service to *100%* of the residential living units in the territory served by AT&T's ILEC subsidiaries, including AT&T Illinois and the Greater Illinois LATAs. *AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, *Memorandum Opinion and Order*, 22 FCC Rcd 5662, App. F ("Promoting Accessibility of Broadband Services," ¶ 1) (2007). According to AT&T Illinois, compliance with that commitment is economically feasible because AT&T is allowed to use non-wireline technologies, such as satellite and Wi-Max fixed wireless technologies, to satisfy a substantial portion of the commitment. (*Id*.).

AT&T Illinois therefore contended that, if the Commission's intent were simply to ensure that high speed Internet service is available to at least 90% of the living units in the Greater Illinois LATAs, regardless of the technology used to provide that service, the Commission's intent is already being more than satisfied. However, AT&T Illinois noted, by its reference to "DSL," the *Order* and *Amendatory Order* appear to require expansion

of the availability of high speed Internet service solely through the use of *wireline* technology. AT&T Illinois presented several arguments asserting such a requirement is unlawful and should be eliminated.

B. STATE LAW

First, AT&T Illinois argued that the Commission has no authority under state law to impose the DSL Internet Requirements. In support of this argument, AT&T Illinois contended that the Commission has only that power given to it by the legislature through the PUA. *Union Electric Co. v. Illinois Commerce Comm'n*, 77 Ill. 2d 364, 383 (1979). AT&T Illinois asserted that the PUA has delegated no authority to the Commission to regulate DSL Internet service or to order a carrier to expand the availability of broadband Internet service.

AT&T Illinois argued that the only authority delegated by the PUA to the Commission with respect to broadband service of any kind is found in Section 13-517 of the PUA, which provides that every ILEC which offers or provides a noncompetitive telecommunications service "shall offer or provide advanced telecommunications service to not less than 80% of its customers by January 1, 2005." 220 ILCS 5/13-517(a). "Advanced telecommunications service" is defined to mean "services capable of supporting, in at least one direction, a speed in excess of 200 kilobits per second (kbps) to the network demarcation point at the subscriber's premises" (i.e., broadband services). 220 ILCS 5/13-517(c). According to AT&T Illinois, the DSL Internet Requirements purport to alter this requirement by (i) increasing the percentage of customers for which advanced service is available (from the 80% determined by the General Assembly to the 90% ordered by the Commission); (ii) changing the statewide requirement to a requirement for a geographic subset of the state (*i.e.*, the Greater Illinois LATAs); (iii) increasing the speed that is to be offered (from the 200 kbps defined in the statute to the faster speeds available through DSL); and (iv) dictating the specific technology a carrier uses to provide the advanced services. AT&T Illinois asserted that the PUA gives the Commission *no* authority to alter the requirement of Section 13-517. To the contrary, the only power that the General Assembly gave the Commission was the power to *reduce* or eliminate the requirement by "grant[ing]a full or partial waiver." 220 ILCS 5/13-517(b).

AT&T Illinois argued that the DSL Internet Requirements also conflict with Section 21-1101(e) of the Cable and Video Competition Law of 2007 (which is Article XXI of the PUA) (the "Video Law"), which requires AT&T Illinois, as a holder of a state-issued authorization to provide video service, either (i) to provide wireline broadband service to 90% of the households in AT&T Illinois' telecommunications service area by December 31, 2008, or (ii) to pay $15 million to the Digital Divide Elimination Infrastructure Fund. 220 ILCS 5/21-1101(e). AT&T Illinois stated that it has complied with the statute by expanding wireline broadband service (which includes both DSL Internet and high speed Internet access provided over the U-verse platform) to 90% of the households in its service territory on a statewide basis. (Wardin Aff., ¶¶ 14-15). By contrast, the Commission here has required AT&T Illinois to deploy DSL Internet service

in 99% of the wire centers in the Greater Illinois LATAs and to expand DSL Internet availability to 90% of the living units in these LATAs (as opposed to the state as a whole), thereby expanding the broadband service obligation that the legislature deemed to be adequate and appropriate for AT&T Illinois.

According to AT&T Illinois, the General Assembly did not give the Commission any authority to alter the broadband requirements of the Video Law. To the contrary, the legislature made it clear that the "Commission's authority to administer [the Video Law] is limited to the powers and duties explicitly provided under [the Video Law]." 220 ILCS 5/21-401(h). The only "powers and duties explicitly provided" to the Commission under the Video Law are to (i) review and approve applications for State-issued authorizations to provide video service (220 ILCS 5/21-401); (ii) receive reports to be filed by holders of State-issued authorizations containing certain information regarding the holder's cable or video service (220 ILCS 5/21-1101(j)); and (iii) submit to the General Assembly a report containing the information provided by holders pursuant to Section 21-1101(j). (220 ILCS 5/21-1101(k)). Accordingly, AT&T Illinois concluded, the Commission has no authority to expand the broadband requirement in Section 21-1101(e).

AT&T Illinois further argued that the DSL Internet Requirements also conflict with the High Speed Internet Services Act and Information Technology Act (the "Internet Act"). According to AT&T Illinois, the Internet Act establishes a process for identifying the need for additional highspeed Internet access deployment in underserved areas of Illinois and for addressing the best means of meeting that need. Section 25 of the Internet Act provides that "[n]othing in this Act shall be construed as giving the Department of Commerce and Economic Opportunity, the nonprofit organization, or other entities any additional authority, regulatory or otherwise, over providers of telecommunications, broadband, and information technology." 220 ILCS 661/25. According to AT&T Illinois, by arbitrarily mandating the expansion of wireline broadband Internet service availability by one company (*i.e.*, AT&T Illinois), the *Order* undermines and conflicts with that process.

AT&T Illinois responded to the arguments of the Attorney General, CUB, and Staff that the Commission does have authority under state law to impose the DSL Internet Requirements. AT&T Illinois understood those parties to argue that the Commission has unlimited power to act as it pleases, so long as no statute expressly *prohibits* the Commission's action. According to AT&T Illinois, that is the exact opposite of the law, which provides that "[t]he Commission is a creature of the legislature, deriving its power and authority *solely* from the statute creating it." (*Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 203 Ill. App. 3d 424, 436 (2d Dist. 1990) (emphasis added)). Thus, "[t]he fact that no statute precludes an agency from taking a particular action does not mean that the authority to do so has been given by the legislature." *Id*. AT&T Illinois asserted that the relevant question, then, is not whether some statute *prevents* the Commission from imposing the DSL Internet Requirements but whether any statute *authorizes* the Commission to do so. AT&T Illinois reiterated that the Commission's only authority with respect to broadband deployment is its authority "to

grant a full or partial *waiver* of the [broadband availability] requirements" set forth in Section 13-517.

In response to the Attorney General's and CUB's complaint that Section 13-517's requirements are out of date, AT&T Illinois asserted that those arguments belong in the General Assembly, not in the Commission. By its plain terms, AT&T Illinois asserted, the statute does not give the Commission any authority whatsoever to "update" or increase the statutory deployment levels – much less to impose special increased deployment requirements that apply to only one ILEC in only part of the state.

AT&T Illinois further asserted that where the General Assembly *has* chosen to provide incentives for further broadband deployment beyond the 80 percent level established by Section 13-517, it did not give the Commission any role at all. While the Video Law requires that holders of state-issued authorizations to provide video service provide wireline broadband service to 90 percent of households in their service areas on a statewide basis (or pay $15 million to the Digital Divide Elimination Infrastructure Fund), the General Assembly did not give the Commission any powers to modify or expand that requirement. Likewise, AT&T Illinois observed, the Internet Act (the only Illinois statute that expressly addresses *Internet* access) establishes a process for a non-profit entity – *not* the Commission – to identify any needs for additional high-speed Internet access deployment and to determine the best way to meet any such needs. Here too, AT&T Illinois asserted, the General Assembly did not give the Commission any power.

AT&T Illinois asserted that none of the other statutes cited by the Attorney General provides any authority for the Commission to impose DSL Internet Requirements. According to AT&T Illinois, Sections 13-301.2 and 13-301.3 merely authorize the Commission to collect customer contributions toward the Digital Divide fund, and to issue grants from that fund to support *voluntary* deployment of advanced services. (220 ILCS 5/13-301.2, 301.3). Section 13-712(b) does not grant authority to the Commission at all; it *excludes* advanced services from the Commission's authority to establish performance standards for basic service. (*Id*. § 5/13-712(b)). Section 13-505.4(c) does not grant authority to the Commission, nor does it apply to AT&T Illinois. Rather, it permits "[a] telecommunications carrier that is not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1" to reduce prices for bundled offerings that may, but need not, include advanced services. (*Id*. § 5/13-505.4(c)). AT&T Illinois stated that it is subject to alternative regulation, and in any event the DSL Internet Requirements here have no relation to prices for bundled offerings. According to AT&T Illinois, the Attorney General's citations prove AT&T Illinois' point that the General Assembly has chosen a de-regulatory approach to advanced services (consistent with the FCC's exclusive jurisdiction, and with the de-regulatory approach adopted by federal law) rather than authorizing Commission diktats. AT&T Illinois argued that Section 13-506.1, cited by the Attorney General, is also inapposite, as it simply allows the Commission to *consider* technological innovations in reviewing an alternative regulation plan for *noncompetitive* services. (220 ILCS 5/13-506.1). Here, AT&T Illinois asserted, the Commission is not reviewing an alternative regulation plan,

and it has attempted to *impose* DSL Internet Requirements in classifying services as *competitive*.

AT&T Illinois also responded to the argument of Staff, the Attorney General and CUB that the Commission can impose the DSL Internet Requirements as a "condition" of competitive classification, even though it has no statutory authorization to impose such requirements elsewhere. AT&T Illinois asserted that the Attorney General's espousal of this position is directly contrary to the Attorney General's argument, on appeal of the *MSA-1 Order*, that the Commission did not have authority even to "*approve*" AT&T Illinois' voluntary commitment "to provide high speed internet access to a portion of Chicago LATA customers." AT&T Illinois asserted that the Attorney General does not even acknowledge its prior position, much less explain why it now has taken the polar opposite view in this case that the Commission can go farther and *impose* DSL Internet Requirements to which AT&T Illinois has *not* agreed.

AT&T Illinois further argued that Section 13-502 does *not* give the Commission any authority to impose conditions onto a competitive classification. AT&T Illinois contended that where the General Assembly *did* authorize the Commission to impose conditions, it did so expressly, citing Section 7-204(f) and 7-102(c) of the PUA. (220 ILCS 5/7-104(f) and 5/7-102(c)). According to AT&T Illinois, the absence of any such authority to impose conditions in the context of a competitive classification shows that the Commission has no such authority here, a point the General Assembly drove home with its statutory mandate that the Commission "shall approve" a competitive classification without further ado if the statutory requirements are met. (220 ILCS 5/13-502(b)).

AT&T Illinois argued that the absence of any Commission authority to impose requirements as a condition of a competitive classification is consistent with the underlying legislative policy that "competition in all telecommunications service markets should be pursued as a substitute for regulation in determining the variety, quality and price of telecommunications services and that the economic burdens of regulation should be reduced to the extent possible consistent with the furtherance of market competition and protection of the public interest." (220 ILCS 5/13-103). According to AT&T Illinois, where the Commission finds that a service *is* competitive, it makes no sense for the Commission to impose, in the same breath, requirements that *increase* the "economic burdens of regulation" and use *regulation* as a substitute for competition "in determining the variety" of services available to consumers – particularly where those services are not even telecommunications services but information services.

AT&T Illinois further argued that, even if the Commission had authority to impose conditions, the DSL Internet Requirements cannot be a "condition" of the classification here. According to AT&T Illinois, those requirements bear absolutely no relation to the Commission's finding that residential local exchange service (or its functional equivalent or substitute) is reasonably available from more than one provider. Indeed, the Commission expressly excluded pure-play VoIP when it made that finding. Thus, AT&T

Illinois concluded, the DSL Internet Requirements would simply be mandates arbitrarily tacked on to an unrelated order.

Finally, AT&T Illinois asserted that the arguments of Staff, the Attorney General and CUB represent a dramatic break from the "conditions" described in the *MSA-1 Order*. There, AT&T Illinois asserted, the Commission "adopted AT&T Illinois' voluntary commitments" with some adjustments (which AT&T Illinois voluntarily accepted). (*MSA-1 Order*, p. 122). In doing so, the Commission expressly relied upon precedent where it had based decisions "on a utility's voluntary acceptance of conditions that it [the Commission] could not otherwise impose." (*Id*., p. 99). Moreover, AT&T Illinois contended, its commitments regarding DSL deployment were expressly *excluded* from those voluntary conditions; in the Commission's words, they were "voluntary commitments by AT&T Illinois that the Commission need not analyze." *Id*. Here, by contrast, Staff, the Attorney General, and CUB are asking this Commission to *impose* conditions *without* AT&T Illinois' "voluntary acceptance," on a subject that the Commission had expressly excluded from its analysis (and from the voluntary "conditions" the Commission accepted). AT&T Illinois concluded that nothing in the *MSA-1 Order* supports such a departure, and that nothing in the Public Utilities Act supports it either.

C. FEDERAL LAW PREEMPTION

AT&T Illinois argued that, over and above the Commission's lack of authority to impose the DSL Requirements under state law, the Commission's imposition of those requirements conflicts with, and is thus preempted by, federal law. AT&T Illinois asserted that DSL Internet access service has been defined as an interstate service and is therefore within the exclusive jurisdiction of the Federal Communications Commission ("FCC"). *In re GTE Operating Cos.*, 13 FCC Rcd. 22466 (1998), *reconsideration denied*, 17 FCC Rcd 22466 (1998). Accordingly, AT&T Illinois argued, the Commission is not free to dictate matters that lie within the FCC's exclusive jurisdiction.

AT&T Illinois further asserted that the FCC has ruled that facilities-based wireline broadband Internet service (including DSL Internet service) is an "information service," not a "telecommunications service," under the Telecommunications Act of 1996 (the "1996 Act"). *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, 20 FCC Rcd 14853, 14862, ¶ 12 (rel. Sept. 23, 2005). According to AT&T Illinois, the FCC has established a "long-standing national policy of nonregulation of information services" and preempted state "economic, public-utility type regulation" that interferes with that policy. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22416-17, ¶ 21 & nn. 77-79 (2004), *petitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). *See also Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 106 (D.C. Cir. 1989) (explaining that the FCC has "exercised [its] . . . jurisdiction to preempt the states from

regulation of . . . enhanced services").[2] Thus, AT&T Illinois concluded, because DSL Internet service is an "information service," the Commission is preempted from regulating the provision of such service and, therefore, is also preempted from imposing the DSL Internet Requirements.

AT&T Illinois responded to the argument of the Attorney General, Staff and CUB that Congress gave the Commission jurisdiction to impose the DSL Internet Requirements under Section 706 of the Telecommunications Act of 1996 (codified at 47 U.S.C. § 1302). According to AT&T Illinois, this argument is contrary to the plain language of the statute. Far from authorizing state commissions to impose requirements in an area squarely within the FCC's exclusive jurisdiction, Section 706 merely provides that state commissions are to "encourage the deployment" of advanced services – not to require such deployment. (47 U.S.C. § 1302(a)). Moreover, the statute specifically directs the states to use de-regulatory measures rather than regulatory fiats: "price cap regulation, regulatory *forbearance*, measures that *promote competition* in the local telecommunications market, or other regulating methods that *remove barriers* to infrastructure investment." (*Id*. (emphasis added)). AT&T Illinois argued that imposing onerous new DSL Internet Requirements does not qualify as "forbearance" by any stretch, and that the other statutory methods are equally inapplicable: the Commission is not using and cannot use price cap regulation (because price cap regulation does not even apply to competitive regulated services, much less services over which the Commission has no pricing authority); the DSL Internet Requirements do not promote competition (in fact, they distort competition by imposing massive financial burdens on one competitor while leaving the others alone); and no one contends that the DSL Internet Requirements would remove barriers to investment.

In response to the Attorney General's citations to the Broadband Data Improvement Act, AT&T Illinois asserted that nothing in that Act authorizes states to force carriers to deploy DSL facilities. To the contrary, Section 1304 simply provides federal funding for state initiatives to study and identify underserved areas and for state efforts "to work collaboratively with broadband service providers and information technology companies to encourage deployment and use." (47 U.S.C. § 1304(b)(1),

[2] As the FCC noted in the *Wireline Broadband Order* (¶ 29), "information service," a term introduced by the 1996 Act, is synonymous with the term "enhanced services" as used in FCC orders issued prior to the 1996 Act. *See also* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 1127, ¶ 347 (1986) ("[W]e do not alter our conclusion in *Computer II* that such [enhanced] services must remain free or state and federal regulation."), *modified on recon.*, 2 FCC Rcd 3035 (1987), *vacated and remanded, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1126, ¶ 18 (1983) (a "major goal [the FCC] sought to achieve . . . was to prevent uncertainty regarding the provision of . . . enhanced services which could arise if there were a threat that *regulation by this or other agencies* might inhibit unregulated providers or create impediments to innovation by carriers and others") (emphasis added), *aff'd, Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984); Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, ¶ 83 n. 34 (1981) ("In this proceeding we have to date preempted the states . . . States, therefore, may not impose common carrier tariff regulation on a carrier's provision of enhanced services.").

(e), (e)(6)). AT&T Illinois asserted that the imposition of deployment mandates is not "collaborative[]" or "encourag[ing]." Section 1305 similarly provides grants to subsidize broadband facilities deployed voluntarily by service providers, nonprofit entities, or states. (*Id*. § 1305).

AT&T Illinois also took issue with the Attorney General's and CUB's argument that deployment mandates are not "public-utility type regulation" as the type preempted by federal law and that states are free to regulate anything other than price. According to AT&T Illinois, a regulation that requires a carrier to offer a service to customers it does not wish to serve (because the cost required to serve them would not be economically justified) is every bit as much "public-utility type regulation" as a price dictate, and that is what the DSL Internet Requirements would do here. AT&T Illinois cited a leading treatise, which describes "the imposition of an obligation to serve all applicants" as one of the "four principal components" of public utility regulation, the same as "price fixing." (Alfred E. Kahn, I *The Economics of Regulation: Principles & Institutions*, p. 3). AT&T Illinois further asserted that since the dawn of public utility regulation, Illinois courts have recognized that the defining trait of a "public utility" is one where "all persons must have an equal right to use the utility . . . however few the number who avail themselves of it," as distinguished from a company that serves "an individual or any particular number of individuals." (*Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164 (1929)).

In response to Staff's argument that the FCC's analysis in the *Vonage Preemption Order* is limited to state rules that impose barriers to entry, AT&T Illinois argued that no such limitation appears in the FCC's order. According to AT&T Illinois, while the particular rules at issue in the *Vonage* case did impose entry barriers, the FCC's *decision* was based on its "long-standing national policy of nonregulation of information services" and its underlying holding that "economic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that led to such regulation of common carrier services historically." (*Vonage Preemption Order*, ¶ 21). AT&T Illinois argued that t FCC's analysis and policy apply with equal force here, where DSL is unquestionably an information service.

AT&T Illinois also took issue with Staff's contention that AT&T Illinois's argument reduces to an "assertion that federal law *does not* preempt an 80% broadband requirement [the requirement in Section 13-517], but *does* preempt a 99% broadband requirement." (Staff Reh. Br., pp. 20-21 (emphasis in original)). According to AT&T Illinois, the relevant point here is that federal law *does* preempt the 90% and 99% Internet access requirements that Staff, the Attorney General, and CUB seek to impose here. The legality of the 80% requirement established years ago in Section 13-517 is not at issue here According to AT&T Illinois, the plain language of 13-517 applies to advanced telecommunications services. It does not require deployment of an interstate information service *per se*, and it prescribes no particular technology.

D. BURDEN OF PROOF

AT&T Illinois took issue with Staff's argument that AT&T Illinois has the "burden of proof" on rehearing because the "burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief." According to AT&T Illinois, under Section 13-502, AT&T Illinois' "burden of proof" was to justify the classification of its residential local exchange service in the Greater Illinois LATAs as "competitive." (220 ILCS 5/13-502(b)). AT&T Illinois maintained that it has *already* satisfied that burden of proof, as evidenced by the Commission's express findings that, even without a consideration of pure-play VoIP, residential local exchange service in the Greater Illinois LATAs meets the criteria for a competitive classification under Section 13-502. (*Order*, pp. 92-94). Those findings are not at issue in this rehearing proceeding.

AT&T Illinois asserted that the *only* issue on rehearing is whether the DSL Internet Requirements should remain in the *Order*. AT&T Illinois argued that rehearing was granted because (i) there was no evidence to support those requirements and (ii) the Order's conclusory assertions that the requirements are "warranted" and "required for the Commission to approve the reclassification" were directly contrary to the *Order*'s findings that the services at issue were properly classified as competitive. AT&T Illinois argued that, in these circumstances, there is no rational basis for Staff's assertion that AT&T Illinois, which opposes the DSL Internet Requirements, should have the "burden of proof" on rehearing. According to Staff, the "burden of proof" includes "the burden of going forward with evidence and the burden of persuading the trier of fact." (Staff Reh. Br., p. 2). Here, AT&T Illinois argued, the burden was on the proponents of the DSL Internet Requirements (i.e., Staff, the Attorney General, and CUB), to go forward with evidence in support of the requirements and persuade the Commission why, based on that evidence, those requirements are appropriate and should remain in the Order. According to AT&T Illinois, however, Staff, the Attorney General, and CUB failed to go forward with *any* evidence and failed to provide any cogent reason for imposing those requirements on AT&T Illinois. Therefore, AT&T Illinois asserted, Staff, the Attorney General, and CUB have failed to meet their burden of proof.

E. ABSENCE OF BASIS FOR IMPOSING THE DSL INTERNET REQUIREMENTS IN THIS PROCEEDING

AT&T Illinois asserted that even if the Commission had the authority under state and federal law to mandate the expansion of AT&T Illinois's statutory wireline broadband obligations, there is no factual or logical basis for imposing that mandate here. According to AT&T Illinois, this proceeding was initiated pursuant to Section 13-502 of the PUA for the *sole* purpose of investigating the propriety of the competitive classification of residential local exchange service in the Greater Illinois LATAs. Thus, AT&T Illinois argued, the question of whether the availability of wireline broadband Internet access needs to be expanded in the Greater Illinois LATAs and, if so, the proper means of accomplishing that goal, is a question far beyond the scope of this proceeding and Section 13-502. It is therefore not surprising, AT&T Illinois asserted,

that the record is devoid of any evidence to support the imposition of the DSL Internet Requirements. In fact, no party presented testimony even suggesting (much less recommending) the imposition of such requirements.

AT&T Illinois also noted that the only basis given by the Commission for its attempt to impose the DSL Internet Requirements was CUB's "observation" in its Initial Brief that, in Docket No. 06-0027, AT&T Illinois "had committed to expand the number of wire centers with DSL in MSA-1 to 99% of wire centers operated by AT&T Illinois" and "to expanding DSL availability within the Chicago LATA." (*Order*, p. 96). The Commission then summarily concluded that "CUB raises a valid issue and that a similar broadband expansion to the Greater Illinois MSA is warranted and is hereby required for the Commission to approve the [competitive] reclassification." AT&T Illinois argued that this conclusion is directly contradicted by the *Order's* findings and conclusions on the sole issue properly before the Commission: whether residential local exchange service in the Greater Illinois LATAs is properly classified as competitive. The only reason suggested by CUB for expanding the availability of DSL was that it would "expand[ ] the scope of customers who have the option of selecting VoIP as a telecommunications service if they choose it." (CUB Init. Br., p. 13). In its *Order,* however, the Commission expressly found that that the availability of VoIP had no bearing on the competitive classification. The Commission expressly held that the "amount or degree of VoIP competition" was "of no consequence to our determinations" and did "not alter either our determinations concerning AT&T's package offerings or our determinations concerning its measured service offerings." (*Order*, p. 92). AT&T Illinois noted that the Commission found ample evidence to support the competitive classification of residential local exchange service (both package and measured service), even though VoIP was "not taken into account," based on the alternatives available from numerous CLECs (including cable companies) and wireless providers. (*Id.*, pp. 90-94). AT&T Illinois concluded that, in light of those findings (which were not in dispute on rehearing), there is no legal, factual, or logical basis to conclude that a forced expansion of DSL availability in the Greater Illinois LATAs is either "warranted" or "required for the Commission to approve the reclassification."

AT&T Illinois further asserted that the fact that it made a *voluntary* commitment to expand DSL Internet capability in MSA-1 as part of a stipulation with CUB in Docket No. 06-0027 does not justify the Commission's decision to *mandate* the same DSL Internet expansion in this case. According to AT&T Illinois, the DSL Internet commitments voluntarily made by AT&T Illinois in Docket No. 06-0027 were expressly excluded from the conditions of the AT&T Illinois and CUB Joint Proposal for which Commission approval was requested in that case. Recognizing that the DSL Internet commitment was a "voluntary" one for which no approval was required, the Commission expressly declined to "analyze" that commitment in approving the Joint Proposal and the competitive classification of the service at issue in Docket No. 06-0027. (*Id*, p. 99). Thus, AT&T Illinois asserted, the Commission's approval of the competitive classification of residential local exchange service in MSA-1 was not dependent or conditioned in any way on the MSA-1 DSL Internet commitment. Nor would such a condition have made any sense; in the MSA-1 case, as in this one, the Commission

found the service at issue to be properly classified as competitive without any consideration of nomadic VoIP. (*MSA-1 Order*, p. 92). Accordingly, AT&T Illinois argued, the Commission's decision to impose the DSL Internet Requirements in this case is directly contrary to the *MSA-1 Order* and, therefore, is unlawful as an unexplained departure from past Commission practice.

AT&T Illinois noted that, in this case, it agreed to make all of the customer protection commitments that it made in the Joint Proposal for which approval *was* requested of, and granted by, the Commission in Docket No. 06-0027. Most significantly, these commitments include caps on increases in stand-alone access line and usage rates and a four-year freeze on prices for the Safe Harbor packages. According to AT&T Illinois, it is these commitments (not the DSL Internet commitment) that the *Order* in this case properly recognizes were integral to the *MSA-1 Order.* AT&T Illinois also noted the Commission's finding that "[e]ven more evidence of substantial competition was provided in this proceeding than in the MSA-1 Reclassification proceeding," and its conclusion that the "record in this proceeding compels the same result as we reached in the MSA-1 Reclassification proceeding." (*Order*, p. 94). AT&T Illinois argued the DSL Internet Requirements – requirements on which the *MSA-1 Order* was expressly *not* conditioned – directly conflicts with this finding as well as the Commission's conclusion that its "determination in the instant proceeding" should be no different than its determination in the MSA-1 case. (*Id*.).

AT&T Illinois argued that, even if the competitive classification of residential service hinged on the availability of nomadic VoIP service (and, as the Commission correctly determined, it clearly does not), and even if the Commission had jurisdiction to require the expansion of DSL availability (and it does not), there still is no factual or logical basis for mandating the expansion of DSL availability in this case. In support of this argument, AT&T Illinois asserted that the undisputed evidence shows that cable modem service (which also can be used as a platform for nomadic VoIP) is available in areas covering 99% of AT&T Illinois' access lines in the Greater Illinois LATAs and that there is at least one cable company offering such service in every wire center within the Greater Illinois LATAs where AT&T Illinois has not deployed wireline, broadband Internet access service. Accordingly, AT&T Illinois asserted, the vast majority of customers in the Greater Illinois LATAs (approximately 90%) already have access to a broadband access service capable of carrying pure play VoIP service.

AT&T Illinois responded to Staff's assertions that the "Commission's role in this proceeding is not merely to make a determination as to whether competition currently exists; rather it must make certain that competition *continues* to exist" and that the Commissioner's "no doubt took the view that, this deployment [of DSL service] will, regardless of the current status of pure play VoIP deployment, enhance the ability of pure play VoIP providers to increase competitive pressure in the Greater Illinois LATAs." (*Id*., p. 8). AT&T Illinois argued that there are at least three fatal flaws in Staff's analysis.

First, AT&T Illinois contended, as a matter of law, Section 13-502 does not provide the Commission with a mandate to "make certain that competition continues to exist" in the future. According to AT&T Illinois, the plain language of Section 13-502 speaks to the present, not the future. AT&T Illinois observed that Staff itself previously agreed with this interpretation of the law, when Staff opined that "Section 13-502 does not charge the Commission with attempting to forecast the state of competition at indeterminate points in the future; rather, under Section 13-502(b) and (c), the Commission's duty is to determine the *actual, current state* of competition." (Reply Brief on Exceptions of the Staff of the Illinois Commerce Commission, Docket No. 06-0027 (Aug. 2, 2006), p. 12 (emphasis in original)). As Staff acknowledged, the Commission found that, even without consideration of pure-play VoIP, residential local exchange service is properly classified as competitive based on evidence regarding "what competitors and customers actually are doing in the Greater Illinois LATAs" (Staff Reh. Br., p. 17), i.e., the "actual, current state of competition." Therefore, AT&T Illinois concluded, consistent with Staff's previous (and correct) interpretation of Section 13-502, there is no lawful basis for imposing a costly mandate for the expansion of wireline broadband Internet service based on speculation regarding the impact that the increased availability of pure-play VoIP may have on competition at "indeterminate points in the future."

Second, AT&T Illinois asserted, the Commission found that the record "does not establish that VoIP is a functionally equivalent alternative offering, or that pure play VoIP offerings are reasonably available at prices, terms and conditions, comparable to [AT&T Illinois'] own measured services." (*Order*, p. 92). According to AT&T Illinois, this finding, which no party challenged on rehearing, directly contradicts Staff's assertion, and a similar argument made by CUB, that the Commission did not "discount pure play VoIP as a platform able to support competitive options in the Greater Illinois MSAs." (Staff Reh. Br., p. 8). The Commission clearly *did* "discount" it, which is one reason why the Commission concluded that AT&T Illinois' inability to quantify the current amount of pure-play VoIP competition "was ultimately of no consequence to our determinations." (*Order*, p. 62).

AT&T Illinois further asserted that Staff's suggestion that expanded availability of VoIP is necessary to enhance competition for local exchange service is also flatly contradicted by Staff's own argument in the original proceeding that pure-play VoIP service is not a competitive substitute *because* customers must obtain a broadband Internet connection. (Staff Init. Br., p. 51). According to AT&T Illinois, if Staff's theory is correct, it should make no difference whether DSL Internet service is available to 0% of customers in the Greater Illinois LATAs or 100% of those customers. Thus, AT&T Illinois contended, under Staff's own view of the world, it makes no sense whatsoever to argue that increasing the availability of DSL Internet service will "enhance" competition in the market for local exchange service.

Third, AT&T Illinois argued that, even if pure-play VoIP were the functional equivalent of residential local exchange service (and the Commission found that it was not), Staff failed to present any evidence that the DSL Internet Requirements are

necessary to "make certain that competition continues to exist" in the future. AT&T Illinois asserted that, to substantiate such a position, Staff would have to be able to point to evidence demonstrating that the extensive competition that already exists as a result of the alternatives available from CLECs, cable companies, and wireless carriers will dissipate in the future to such an extent that action must be taken to expand the availability of pure-play VoIP. According to AT&T Illinois, no such evidence exists. To the contrary, AT&T Illinois asserted, the CLEC/cable and wireless market shares in Illinois have consistently and significantly increased over the last several years and there is no evidence that this trend will change.

AT&T Illinois further reiterated that the vast majority of customers (approximately 90%) in the Greater Illinois LATAs already have access to AT&T Illinois' wireline broadband Internet service and/or cable modem service, both of which are capable of supporting pure-play VoIP. Thus, AT&T Illinois concluded, pure play VoIP is already a reasonably available alternative within the meaning of Section 13-502. (*MCI Telecommunications Corp. v. Ill. Comm. Comm.*, 168 Ill. App. 3d 1008, 1015 (1st Dist. 1988) (affirming Commission Order approving competitive classification of pre-merger AT&T's long distance services at a time when only 70% of Illinois consumers had any access to alternative providers)).

AT&T Illinois argued that Staff also failed to explain how the imposition of the DSL Internet Requirements in this case squares with the *MSA-1 Order*. While conceding that the Commission's approval of the competitive classification of residential local exchange service in MSA-1 was expressly not dependent or conditioned in any way on AT&T Illinois' voluntary commitment, as part of a stipulation with CUB, to expand the availability of DSL service in MSA-1, Staff nonetheless argued that "demographic, cost and market conditions are different in the Greater Illinois MSAs than they are in MSA1," thereby indicating that the "remedies need not be the same as in MSA-1." (Staff Reh. Br., pp. 8-10). In response, AT&T Illinois argued that Staff failed to point to any evidence of relevant differences in "demographic, cost and market conditions" that would logically justify requiring the expansion of DSL availability as a "remedy" in the Greater Illinois LATAs when it was not considered a necessary "remedy" in MSA-1. Instead, AT&T Illinois contended, Staff merely referred to the Commission's statement that not all low use customers in the Greater Illinois LATAs can obtain service from alternative providers at the same rates, terms and conditions as AT&T Illinois' measured service option. (Staff Reh. Br. pp. 9-10, citing *Order*, p. 94). As the *Order* makes clear, however, this was the same situation found by the Commission to exist in MSA-1. (*Order*, p. 94). Nonetheless, the Commission found, for both MSA-1 and the Greater Illinois LATAs, that "sufficient competition existed to reclassify measured service as competitive overall." (*Id*.). In fact, the Commission found that "[e]ven more evidence of substantial competitive was provided in this proceeding than in the MSA-1 proceeding." *Order*, p. 94. AT&T Illinois concluded that, if anything, this distinction means that there is even less reason in this case to require the expansion of broadband Internet service as a means of promoting future VoIP competition than there would have been in the MSA-1 case.

AT&T Illinois also responded to Staff's assertion that the Commission deemed the DSL Internet Requirements to be a necessary part of the "balance between substituting competition for regulation and ensuring consumer choice." (Staff Reh. Br., p. 4, citing *Order*, p. 94). AT&T Illinois argued that Staff's assertion is unsupported by any language in the Order. According to AT&T Illinois, in the portion of the Order cited by Staff (*Order*, pp. 94-95), the Commission discusses the "plan" approved in the Order in Docket No. 06-0027 (the "*MSA-1 Order*") to "allow[ ] for a gradual increase in network access lines and usage rates but accompan[y] those increases with consumer safeguards for customers that may experience financial hardship." (*Order* at 94). The "consumer safeguards" expressly referred to are the "Safe Harbor and rate cap provisions" designed to "protect a subset of customers from sharp price increases that might occur during the transition from below-market measured service prices to prices more reflective of the competitive environment." (*Id.*). According to AT&T Illinois, it is these "consumer safeguards," not the DSL Internet Requirements, which the Commission describes as "represent[ing] a careful *balance* between correcting a pricing problem and protecting customers with fewer alternatives in the marketplace." (*Id*., pp. 94-95) (emphasis added). The Commission found it appropriate to approve the same consumer safeguards in this case. (*Id*.). AT&T Illinois argued that neither the consumer safeguards discussed at pages 94-95 of the Order, nor the "balance" intended to be struck by adopting those safeguards, have anything whatsoever to do with expanding the availability of broadband Internet service.

AT&T Illinois also responded to the Attorney General's arguments in support of the DSL Internet Requirements. The Attorney General argued that, to truly benefit from competition, consumers "need access not just to telephone service, but to broadband Internet service as well." The Attorney General then asserted that AT&T Illinois' deployment of broadband Internet access service in the Greater Illinois LATAs is "dismally low," because it is allegedly less than the 100% broadband coverage required by the AT&T/BellSouth merger commitment. The Attorney General, therefore, contended that the Commission was justified in requiring the expansion of DSL Internet service in light of the "importance of high speed Internet access to the economic development of the State and consumers' interest in that service are matters of both state and federal public policy." In response, AT&T Illinois argued that the Attorney General's rationales have absolutely nothing to do with the purpose of this case, which was to determine whether residential local exchange service should properly be classified as competitive. AT&T Illinois stated that, while it also supports the expansion of broadband service, this case involves telephone service, not broadband Internet service, and a specific type of telephone service at that, i.e., residential local exchange service. For this reason alone, AT&T Illinois asserted, the Attorney General's argument that "broadband is good" is irrelevant to this case and should be disregarded.

AT&T Illinois further argued that even on the Attorney General's own terms, there is no basis for imposing the DSL Internet Requirements. The Attorney General expressly acknowledges that there "*should not have been* any basis for [these] requirement[s]" if AT&T Illinois had been in compliance with the AT&T/BellSouth merger commitment to make broadband service available to 100% of the residential living units

in the areas served by AT&T's ILEC subsidiaries, including AT&T Illinois. (AG Reh. Br., pp. 12-13 (emphasis in original)). In fact, AT&T Illinois asserted, AT&T *is* in full compliance with that merger commitment and does offer broadband Internet access service, using both wireline and non-wireline (such as satellite) technologies, to 100% of the living units in the Greater Illinois LATAs. AT&T Illinois took issue with the Attorney General's assertion that the Company is not in compliance with the merger commitment. According to AT&T Illinois, that assertion was based solely on the Attorney General's apparent misinterpretation of certain data request responses, including one in which AT&T Illinois provided a link to a website which contains information about the Internet access service available in Illinois. AT&T Illinois asserted that the Attorney General improperly disregarded AT&T Illinois' responses to follow-up data requests which made it clear that, as expressly permitted by the terms of the merger commitment, the Company offers satellite broadband Internet service in all areas of Illinois (including the Greater Illinois LATAs) where wireline broadband service is not available. According to AT&T Illinois, the evidence presented by Mr. Wardin in his Reply Affidavit demonstrates that information regarding the availability of satellite broadband service can, in fact, be found on the website to which links were provided to the Attorney General. (Wardin Reply Aff., ¶ 4).

AT&T Illinois also took issue with the Attorney General's suggestion that in those areas where AT&T Illinois does not offer wireline broadband Internet access, AT&T Illinois is placed at a disadvantage, compared to cable companies, in terms of competing for the business of customers who wish to "bundle" their local exchange service with broadband Internet access service obtained from the same entity that provides their telephone service. AT&T Illinois stated that, in fact, in areas where it does not currently offer wireline broadband Internet service, it offers bundles that include satellite broadband Internet service. (Wardin Reply Aff., ¶ 3.) AT&T Illinois further asserted that, even if its is true that cable companies did have an advantage, the Attorney General failed to explain how that fact lawfully or logically supports the adoption of the DSL Internet Requirements in this proceeding. AT&T Illinois contended that the Attorney General's assertion, if true, proves only that customers are even *more* likely to view the local exchange service offered by cable companies as a desirable alternative to AT&T Illinois' local exchange service. Thus, the Attorney General's argument undermines, rather than supports, the conclusion that expansion of AT&T Illinois' wireline broadband Internet service should be a required condition of the competitive classification of the local exchange service at issue in this case.

AT&T Illinois also took issue with the Attorney General's complaint that in some areas within the Greater Illinois LATAs, where neither cable modem service nor AT&T Illinois wireline broadband service is available, consumers may not have a choice of any wireline broadband service provider. AT&T Illinois reiterated that the vast majority of AT&T Illinois customers (approximately 90%) have a choice of cable modem service and/or AT&T wireline broadband service. (Wardin Reply Aff., ¶ 4). When other technologies, such as satellite and wireless are taken into account, there is 100% coverage, with almost all areas having a choice of providers. (*Id*.).

AT&T Illinois also responded to CUB's argument that the imposition of the DSL Internet Requirements is consistent with the "Commission's stated desire to provide symmetry of the transitional mechanisms conditioning the wide pricing flexibility granted to AT&T Illinois between customers in the Chicago area and those in the more rural Greater Illinois MSAs." (CUB Reh. Br., p. 6). AT&T Illinois asserted that the "transitional mechanisms" referred to by the Commission are those customer safeguards, such as the Safe Harbor packages and the cap on annual increases in stand-alone network access line and usage rates, designed to protect the subset of low use measured service customers who "may experience financial hardship" during the "*transition* from below-market measured service prices to prices more reflective of the competitive environment." (*Order*, pp. 94-95 (emphasis added)). According to AT&T Illinois, the "transition mechanisms" do not include the DSL Internet Requirements, as evidenced by the Commission's statement that AT&T Illinois "accepts all" of the Staff proposals characterized by the Order as comprising the "transitional mechanism." (*Order*, p. 95). AT&T Illinois further asserted that its voluntary agreement to expand DSL availability in MSA-1 as part of a Stipulation with CUB in Docket No. 06-0027 was expressly excluded from the "transitional mechanisms" for which the parties requested Commission approval in that docket. As a result, the Commission expressly declined to "analyze" that commitment or to make it a condition of the Commission's approval of the competitive classification of the services at issue in Docket No. 06-0027. According to AT&T Illinois, CUB does not dispute this fact. Thus, AT&T Illinois concluded, far from providing "symmetry" between the results of the MSA-1 proceeding and this proceeding, the DSL Internet Requirements in this case provide "asymmetry" and are directly contrary to the *MSA-1 Order*.

F. COSTS TO COMPLY WITH THE DSL INTERNET REQUIREMENTS

AT&T Illinois presented evidence showing that the total cost to comply with the DSL Internet Requirements would be approximately $38.3 million. (Wardin Aff., ¶ 7). According to AT&T Illinois, this represents an estimate of the additional cost that would be incurred over and above the costs associated with the deployment of wireline broadband facilities already scheduled through the end of 2010. AT&T Illinois argued that, based on these costs, expansion of wireline broadband Internet access to the degree mandated by the *Order* and *Amendatory Order* is unduly burdensome and costly, and not economically viable.

AT&T Illinois stated that the fact that it was willing to make voluntary a commitment to expand DSL Internet availability in Docket No. 06-0027 does not imply that the same obligation would be appropriate in this proceeding. According to AT&T Illinois, the economic viability of wireline, broadband Internet access service depends significantly on household density. Most of the costs of DSL deployment are associated with facilities shared by multiple customers. Therefore, the costs per-customer-served are lower where the size of the potential customer base in any geographic area is large, and higher where the potential base is small. AT&T Illinois asserted that household density is much higher in the Chicago LATA (571 households per square mile), as compared to the Greater Illinois LATAs (136 households per square mile). Thus, AT&T

Illinois concluded, both the central office and outside plant costs will be substantially higher on a per-customer-served basis in the Greater Illinois LATAs than in the Chicago LATA. (Wardin Aff., ¶ 8). According to AT&T Illinois, the costs of broadband Internet access deployment are also dependent on the level of broadband deployment existing at the time that the requirement is imposed. The level of deployment was higher in the Chicago LATA at the time of the Order in Docket No. 06-0027 than is the case today in the Greater Illinois LATAs. The lower level of deployment in the Greater Illinois LATAs reflects the less favorable economics of using this technology, as opposed to other technologies, to provide service. (Wardin Aff., ¶ 9, Attach. 6).

As a result, AT&T Illinois concluded, the costs to expand wireline, broadband Internet access service would be much higher in the Greater Illinois LATAs, both in absolute terms and on a per-household-served basis, than they were in the Chicago LATA. Specifically, AT&T Illinois estimated in Docket No. 06-0027 that the total cost required to meet the 90%/99% requirement in the Chicago LATA would be approximately $17 million. This represented a cost of $560 per household that would likely purchase this service. (Wardin Aff., ¶ 10). The same figures for the Greater Illinois LATAs are $38.3 million in total and $1,950 per household. (*Id*.). The amount AT&T Illinois has to or would have to recover from customers subscribing to its broadband service each month to recover these costs was $11.93 for the Chicago LATA, compared to $41.55 for the Greater Illinois LATAs. AT&T Illinois asserted that these amounts do not include operating costs or the costs of transport required to connect broadband customers to the Internet. (*Id*.). Thus, AT&T Illinois concluded, it will be 3.5 times more expensive to meet this broadband deployment requirement in the Greater Illinois LATAs than it was in the Chicago LATA. (*Id*.).

AT&T Illinois further asserted that the costs that would be imposed by the DSL Internet Requirements are disproportionate to the relief granted by the Commission. In Docket No. 06-0027, the $17 million expenditure on DSL expansion was in the context of an order approving a competitive classification of local exchange service for 83% of AT&T Illinois' residence lines. The $38.3 million expenditure required here is in the context of an order approving a competitive classification of local exchange service for an additional 15% of AT&T Illinois' residence lines. According to AT&T Illinois, a proportionate expenditure would be under $3 million, not $38.3 million. (Wardin Aff., ¶ 11).

AT&T Illinois noted that, in their briefs, none of the other parties disputed the facts summarized above. Nonetheless, the Attorney General argued that the $38 million that AT&T Illinois would be required to invest to comply with the requirement is small relative to AT&T Illinois' total operating revenues. (AG Reh. Br., p. 17). The Attorney General and CUB also argued that the requirement that AT&T Illinois expend $38 million on the DSL Internet Requirements is fair *quid pro quo* for the "offsetting" increased revenues that they assert AT&T Illinois will receive as a result of future increases in prices for residential local exchange service. (*Id*., pp. 19-20; CUB Reh. Br., pp. 7-8). In response, AT&T Illinois argued that the costs to comply with the DSL Internet Requirements relative to AT&T Illinois' total revenues are irrelevant. According

to AT&T Illinois, there is no lawful basis for the Commission to impose a requirement totally unrelated to the only issue properly before the Commission, as the "price" for granting AT&T Illinois relief to which it is lawfully entitled based on the Commission's finding that AT&T Illinois' residential local exchange service meets the criteria for classification as competitive under Section 13-502.

G. CURRENT STATE AND FEDERAL BROADBAND INITIATIVES

AT&T Illinois argued that the DSL Internet Requirements are not only unlawful and unduly costly and burdensome, they are also inappropriate because they conflict with current state and federal initiatives to (i) identify areas that are unserved or underserved in terms of broadband Internet access and (ii) identify and fund viable projects for meeting the broadband needs of those areas. According to AT&T Illinois, the DSL Internet Requirements would force AT&T Illinois to make an uneconomic investment in the extension of wireline broadband Internet services to areas for which broadband services may otherwise be extended as a result of projects implemented in accordance with the state and federal broadband initiatives.

For example, AT&T Illinois asserted, the Internet Act directs the Illinois Department of Commerce and Economic Opportunity (the "Department") to "enlist a nonprofit organization to implement a comprehensive, statewide high speed Internet deployment strategy and demand creation initiative" with the purpose, *inter alia*, of "ensuring that all State residents and businesses have access to affordable and reliable high speed Internet service." 220 ILCS 661/15(1). The duties of the selected nonprofit organization[3] include the "creat[ion] [of] a geographic statewide inventory of high speed Internet service and other relevant broadband and information technology services," and "collaborat[ing] with high speed Internet providers and technology companies to encourage deployment and use, especially in underserved areas, by aggregating local demand, mapping analysis, and creating market intelligence to improve the business case for providers to deploy." 220 ILCS 661/20(a)(1), (4). According to AT&T Illinois, this process is still underway. (Wardin Aff., ¶ 17).

AT&T Illinois further asserted that, at the federal level, the American Recovery and Reinvestment Act (the "Recovery Act") provides the Rural Utilities Service ("RUS") of the Department of Agriculture and the National Telecommunications and Information Administration ("NTIA") with $7.2 billion to expand access to broadband service in the United States. Specifically, to facilitate rural economic development, the Recovery Act appropriates $2.5 billion to RUS to extend loans and grants to broadband projects where at least 75% of the area to be served by the project is in a rural area that lacks significant access to highspeed broadband. The program established by the RUS for this purpose is called the Broadband Incentive Program ("BIP"). The Recovery Act also appropriates $4.7 billion to NTIA to provide grants for broadband initiatives throughout the United States, including unserved and underserved areas. NTIA will issue such

[3] The nonprofit organization selected by the Department for this role is the Partnership for a Connected Illinois, Inc., a partnership of Southern Illinois University and other entities, including Connected Nation, Inc. (Wardin Aff., ¶ 17).

grants through its Broadband Technologies Opportunity Program ("BTOP"). (Wardin Aff., ¶ 18).

AT&T Illinois argued that, in light of these initiatives, a decision to single out one broadband provider (*i.e.*, AT&T Illinois) for a mandate to extend broadband service to particular access areas using one particular technology is unnecessary and inappropriate.

H. TIMING ISSUES

AT&T Illinois noted that the Commission gave it slightly over 16 months from the date of the original *Order* to complete the DSL Internet Requirements (*i.e.*, until October 24, 2010). (*Order*, p. 99). AT&T Illinois further asserted that, in granting its Petition for Rehearing, the Commission effectively suspended these requirements pending further review. AT&T Illinois stated that, while it believes that the Commission will not re-impose this obligation on the Company, in the event that the Commission leaves the DSL expansion obligation unchanged, at a minimum the timeframe provided for completing this work needs to be reset based on the adoption date of the Commission's Order on Rehearing. Assuming that the Commission acts in mid-December, the new deadline would be approximately May 1, 2011.

AT&T Illinois further asserted that, to maintain even a semblance of "parity" with the Company's voluntary DSL expansion commitment in Docket No. 06-0027, the deadline should be extended well beyond that date. Under the Stipulation/Joint Proposal in that docket, AT&T Illinois had one year from the "Effective Date" of the Order, for a total of approximately 14 months.[4] AT&T Illinois asserted that, in light of the fact that the DSL expansion ordered by the Commission in the Greater Illinois LATAs is substantially broader in scope and more expensive than in the MSA-1 proceeding, AT&T Illinois will be required to install more equipment in more exchanges; and, because the area is much less dense, there will be many more separate construction jobs in remotely located exchanges. According to AT&T Illinois, construction of this type is generally not undertaken between mid-December and mid-March. Since the ground is frozen, digging trenches, boring and laying concrete pads for the VRADs is not feasible. In addition, cable is much less flexible in cold weather. Because the Commission's Order on Rehearing will be issued in mid-December (as compared to August in Docket No. 06-0027), a 16-month timeframe will encompass two entire 3-month winter periods, when construction is effectively suspended. Accordingly, AT&T Illinois argued, to provide it with a construction period that is more comparable to what the Company agreed to in Docket No. 06-0027, the deadline should be extended for an additional 14 months to July 1, 2012. (Wardin Reply Aff., ¶ 8).

III. POSITION OF STAFF

[4] The Effective Date was approximately seven weeks after the date of the original Order due to the rehearing process.

Staff argues that AT&T's arguments should be rejected, and the DSL requirement retained, inasmuch as it is both logically and factually supported; and it is not preempted by federal law nor does it conflict with federal or state law, and indeed is authorized by state law.

1. Logical and factual support for the DSL Requirement

More specifically, Staff observes the Commission to have explained in its Order that its determinations regarding measured service reclassification struck a balance between substituting competition for regulation and ensuring consumer choice. The Staff further observes that, in striking this balance the Commission explicitly determined it appropriate to impose "DSL Internet Requirements" on AT&T, which it specifically deemed as "warranted" and "required for the Commission to approve reclassification." Because the Commission determined these requirements to be required for the Commission to approve the competitive classification, Staff argues that the Commission presumably would not have determined AT&T's measured service reclassifications to be appropriate if these requirements had not been imposed (i.e., without this condition the balance would have tipped such that the Commission would not have found AT&T's reclassification of measured services appropriate).

More specifically, avers Staff, the Commission understood CUB to argue that: "increasing the provisioning of broadband service expands the scope of customers who have the option of selecting VoIP as a telecommunications service if they choose it[,]" thereafter finding that: "CUB raises a valid issue and that a similar broadband expansion to the Greater Illinois MSAs is warranted and is hereby required for the Commission to approve the reclassification." This demonstrates, according to Staff, the Commission's understanding that broadband expansion went part and parcel with reclassification.

The purpose of this rehearing, as Staff understands it, is to determine whether an adequate record exists to impose such a requirement, and whether the Commission has the authority to impose such a requirement. Because Staff understands the Commission to have determined that a DSL Internet Requirement is a necessary condition for appropriate competitive classification of its residential services in the Greater Illinois MSAs, in the event the Commission finds the record and/or its authority inadequate, presumably it will remove this requirement and revise the Order to reflect that AT&T's measured services were inappropriately classified as competitive.

Staff understands AT&T to assert that there is no logical or factual basis for imposing a DSL Internet Requirement in this proceeding. In supporting this position, according to Staff, AT&T asserts that the availability of wireline broadband Internet access in the Greater Illinois LATAs is beyond the scope of an investigation into the competitive status of the residential local exchange market or the scope of Section 13-502. Staff sees this position as inconsistent with the testimony and evidence presented by AT&T itself, which is replete with arguments as to why the Commission must consider VoIP services when making its determinations with respect to the classification of residential local exchange services. For example, Staff points to AT&T's assertion,

with respect to VoIP services, that: "[c]ustomers clearly view them as "substitutes" and that is what counts under Section 13-502; and its further assertion that: "the plain language of Section 13-502(b) directs the Commission to also consider the availability of substitute services provided by other technologies and providers that the Commission does not regulate, such as wireless and VoIP providers.

Thus, according to Staff, AT&T's position, as set out in its case-in-chief, is directly at odds with any notion that the availability of broadband Internet access, and thus over-the-top VoIP, is beyond the scope of an investigation into the competitive status of the residential local exchange market. Staff notes that, having convinced the Commission of the importance of the relationship between VoIP services when making its determinations with respect to the classification of residential local exchange services, AT&T now suggests that such a relationship is beyond the scope of this proceeding, a clearly inconsistent position.

Staff urges the Commission not to entertain AT&T's argument. Staff points out that the purpose of requiring alleged legal and factual errors in a Commission order to be raised in a petition for rehearing is to inform the Commission and opposing parties of such matters. CUB v. Commerce Comm'n, 166 Ill. 2d 111, 135; 651 N.E.2d 1089, 1101; 1995 Ill. Lexis 77 at 33; 209 Ill. Dec. 641 (1995). Insofar as legal or factual error has resulted from the injection of broadband availability into this proceeding, Staff sees AT&T as the author of such error; AT&T's witnesses, W. Karl Wardin and Harry M. Shooshan, testified in detail in the company's direct case regarding the allegedly substantial competitive inroads being made by so-called "pure-play" VoIP. Staff further calls the Commission's attention to record evidence that pure-play VoIP providers rely on other carriers' broadband networks to carry traffic. Accordingly, whether it is error for the Commission to make findings regarding broadband – which AT&T itself placed at issue – is something that Staff sees AT&T as estopped from arguing here.

While AT&T asserts that the Commission rejected any reliance on VoIP issues when making its determinations, Staff considers AT&T to have misread the Commission's Order. In its Order, Staff sees the Commission to have found, with respect to AT&T's package offerings, that: "competition to serve package service customers is well established", but that, with respect to AT&T's measured service offerings, "while there may be competitive offerings that are identical, similar or substitutable for measured service, there are none currently available at comparable rates – at least for low use customers."

Staff notes that, while the Commission obviously reached differing conclusions regarding package and measured service, it reached the same conclusion with respect to the role of VoIP competition information – that is, evidence of actual pure play VoIP competition did not factor directly into the Commission's assessment of current competitive entry. The Commission stated that its assessments were made: "based upon what competitors and customers actually are doing in the Greater Illinois LATAs", and that AT&T did not: "present evidence in this proceeding regarding VoIP provider competitive entry market shares and actual competitive market penetration of VoIP

providers." Accordingly, the determinations the Commission made with respect to the amount of competitive pressure brought to bear by competitors in the Greater Illinois LATAs was not influenced by evidence of actual pure play VoIP competition specifically because of AT&T's failure to adduce any such evidence, notwithstanding its claim that pure play VoIP competition is widespread.

By no means did the Commission discount pure play VoIP as a platform able to support competitive options in the Greater Illinois MSAs. Rather, in Staff's estimation, it determined that this record was bereft of any evidence that this was talking place. By imposing a requirement that AT&T expand its DSL availability in the Greater Illinois MSAs, Staff sees the Commission to have taken the view that, this deployment will, regardless of the current status of pure play VoIP deployment, enhance the ability of pure play VoIP providers to increase competitive pressure in the Greater Illinois LATA markets. The Commission, as it clearly stated, found that conditions "warranted" imposition of this requirement as a condition for its approval of the reclassification of measured services on AT&T's meeting this requirement.

Thus, says Staff, it can be reasonably inferred that, in contrast to AT&T's assertions, the Commission, because it could not rely on evidence of actual VoIP deployment presented by the Company, was required to impose a condition intended to enhance the availability of such offerings throughout the Greater Illinois MSAs.

2. The MSA-1 Proceeding

Staff hears AT&T to argue that the Commission's determination that a DSL Internet Requirement is necessary in order for competitive classification of services in the Greater Illinois MSAs is inconsistent with its determinations in its MSA-1 Order. As AT&T itself notes, however, the circumstances in the Greater Illinois MSAs differ from those in MSA 1. In particular, AT&T argues that "household density is much higher in the Chicago LATA, as compared to the Greater Illinois LATAs." AT&T argues that, because of this density disparity, "both the central office and outside plant costs will be substantially higher on a per-customer-served basis in the Greater Illinois LATAs than in the Chicago LATA", and that the level of deployment in the Greater Illinois LATAs is lower than was the level of deployment in MSA 1 at the time of the Order in the MSA-1 proceeding.

However, Staff notes the fact that demographic, cost and market conditions are different in the Greater Illinois MSAs than they are in the MSA 1 underscores the point that, while the Commission's addressed many of the same questions in this proceeding that were addressed in the MSA 1 proceeding, these questions exist in the context of differing circumstances.

AT&T notes that the Commission declined to analyze the DSL Internet Requirements to which AT&T voluntarily committed in the MSA 1 proceeding. According to Staff, however, this does not mean that the Commission must decline to

examine such requirements in every instance or, more significantly, when circumstances differ, as they do here, from those examined in the MSA 1 proceeding.

AT&T argues that the Commission found even more evidence of competition in this proceeding than in the MSA 1 proceeding. Again, Staff does not se this as altering the fact that with respect to measured services the Commission found here that not all customers can obtain service on similar rates, terms, and conditions as can be obtained from AT&T. Because, as AT&T itself has noted, demographic, cost and market conditions are different in the Greater Illinois MSAs than they are in MSA 1, the remedies the Commission prescribes need not, according to Staff, be the same as in MSA 1.

AT&T suggests that the Commission itself has bound itself to adopting the exact same solution as in the MSA 1 proceeding. However, according to Staff this is not so; what the Commission concluded is that, as in the MSA 1 proceeding, this proceeding requires the Commission to take measures that accomplish the General Assembly's stated goal of substituting competition for regulation while ensuring customer choice. In Staff's view, the Commission accomplished this by imposing conditions similar to those imposed in the MSA 1 Order. While the resulting solution in the Commission's Order produces the same general result produced by the MSA 1 Order, the Staff does not see the Commission as having bound itself to a determination identical in every aspect to that in the MSA 1 Order as AT&T suggests. In fact, avers Staff, the Commission's explicit adoption of the DSL Internet Requirements clearly indicates a prescription, although perhaps not an ultimate result, differing from that imposed by the Commission in the MSA 1 proceeding. In Staff's opinion, AT&T's characterization of the Commission's Order simply reads into the Order an inconsistency not present.

AT&T implies that, the Commission's determination to the contrary notwithstanding, there is Greater Illinois specific evidence regarding VoIP penetration or the penetration of platforms used for over-the-top VoIP. In particular, AT&T cites to evidence that cable modem service is available in 99% of areas served by AT&T. IBT However, even if true, Staff does not believe this constitutes evidence that VoIP is available to 99% of customers in such areas; rather, it merely indicates that cable modem service is available to some fraction of customers in each wire center AT&T serves. Staff states that there is no evidence regarding the percentage of AT&T's customers to whom cable modem service available is available, and AT&T concedes that it is "unable to provide the number of customers in each such exchange that are able to obtain broadband Internet access service capable of supporting over the top VoIP since AT&T Illinois does not have the requisite data from those providers which are able to provide such service." Thus, contrary to AT&T's assertions, the Commission does not have a reliable Greater Illinois LATA specific estimate of VoIP penetration.

Finally, AT&T refers to the American Recovery and Reinvestment Act ("ARRA") and notes that the ARRA provides for $7.2 billion to expand access to broadband service. In Staff's opinion, AT&T fails to explain what relevance this reference has with respect to the proceeding. Certainly, ARRA has the potential to bring broadband

capable of supporting pure-play VoIP to areas where providers such as AT&T might not otherwise choose to deploy. However, it by no means certain that this will be the case. For example, despite AT&T's contention that it will not be able to recover a return on, and a return of, its investment in broadband in the Greater Illinois LATAs if it builds out wireline high speed Internet service to 90% of its lines in the Greater Illinois LATAs (AT&T response to AG Data Request 9.4 attached hereto as Exhibit B), AT&T itself has not elected to apply for ARRA funding and has no plans to do so in the future. This being the case, avers Staff, the Commission should discount AT&T's assertion that ARRA funding obviates any need for a requirement that will ensure that broadband capable of supporting pure-play VoIP is deployed in the Greater Illinois LATAs.

3. State Law Authority

Staff states that, contrary to AT&T's assertions, the Commission's DSL requirement is a proper exercise of discretion under Section 13-502 of the PUA. IN Staff's view, Section 13-502 affords the Commission broad latitude to consider numerous factors in crafting orders tailored to the individual circumstances of each proposed reclassification, which is precisely what the Commission has done here.

Staff notes that, in crafting its Greater Illinois MSAs Reclassification Order, the Commission clearly gave careful consideration to the same consumer protection questions that concerned it in the MSA-1 Proceeding, first stating, bluntly, that: "[i]n our opinion, the record in this proceeding compels the same result [regarding cap and consumer protection questions] as we reached in the MSA-1 Reclassification proceeding." The Commission then ordered AT&T to adopt a number of rate cap and consumer protection measures as conditions of reclassification.

The Commission next noted that:

> CUB observes that AT&T Illinois had committed to expand the number of wire centers with DSL in MSA-1 to 99% of wire centers operated by AT&T Illinois. [citation]. CUB further notes that AT&T Illinois committed to expanding DSL availability within the Chicago LATA. [citation]. We believe CUB raises a valid issue and that a similar broadband expansion to the Greater Illinois MSAs is warranted and is hereby required for the Commission to approve the reclassification.

Staff sees it as clear from the foregoing that the Commission found the same conditions to obtain in the Greater Illinois MSAs as obtained in 2006 in MSA-1. The Commission, according to Staff, adopted a reclassification plan that: (a) has proven reasonably effective; (b) appears to have been quite acceptable to AT&T in 2006; and (c) has, to date, withstood legal challenges.

Staff notes the well-established doctrine that where a legislature expressly grants a power, or delegates a duty to an administrative agency, that grant or delegation carries with it a grant of authority to do everything reasonably necessary to perform its

delegated function. Lake County Bd. of Review v. Illinois Property Tax Board of Appeal, 119 Ill. 2d 419, 427; 519 N.E.2d 459, 463; 1988 Ill. Lexis 16 at 12; 116 Ill. Dec. 567 (1988). Likewise, a legislature can establish broad policy guidelines, and leave the detailed application of those guidelines to the administrative agency charged with carrying them out. Id. at 427; 519 N.E.2d at 463; 1988 Ill. Lexis 16 at 11. Administrative agencies may properly exercise discretion to accomplish in detail what is authorized in general terms. Id. at 428; 519 N.E.2d at 463; 1988 Ill. Lexis 16 at 12-13.

Staff notes that the general grant or delegation to the Commission in the context of this proceeding is to: (a) substitute competition for regulation in a manner consistent with protection of consumer interests; while (b) insuring that a sufficient variety and quantity of services are available to all citizens, and that such services are reliable. 220 ILCS 5/13-103(a)-(b). Furthermore, the state has a clear, express policy – enshrined in statute – of requiring ILEC to provide advanced services. 220 ILCS 5/13-517(a). The more specific grant or delegation to the Commission is to determine whether the services for which reclassification is sought are in fact competitive. 220 ILCS 5/13-502.

Staff further notes that, pursuant to Section 13-502, the Commission "[has] the power to investigate the propriety of any classification of a telecommunications service[.]" 220 ILCS 5/13-502(b). In conducting such investigation, the Commission "shall, at a minimum", consider the following factors:

> (1) the number, size, and geographic distribution of other providers of the service;
>
> (2) the availability of functionally equivalent services in the relevant geographic area and the ability of telecommunications carriers or other persons to make the same, equivalent, or substitutable service readily available in the relevant market at comparable rates, terms, and conditions;
>
> (3) the existence of economic, technological, or any other barriers to entry into, or exit from, the relevant market;
>
> (4) the extent to which other telecommunications companies must rely upon the service of another telecommunications carrier to provide telecommunications service; and
>
> (5) any other factors that may affect competition and the public interest that the Commission deems appropriate.
>
> 220 ILCS 5/13-502(c)

Staff sees this delegation of authority to the Commission as a broad one, authorizing it to investigate and rule upon, "at a minimum" all matters potentially

affecting competition and the public interest that it deem appropriate. The availability of DSL service in the Greater Illinois MSAs is, in Staff's view, clearly a factor "potentially" affecting competition and the public interest. Staff notes that the Commission comprehended the importance of this; it understood CUB to argue that: "increasing the provisioning of broadband service expands the scope of customers who have the option of selecting VoIP as a telecommunications service if they choose it[,]"and then finding that: "CUB raises a valid issue and that a similar broadband expansion to the Greater Illinois MSAs is warranted and is hereby required for the Commission to approve the reclassification."

Staff urges the Commission to keep in mind that the Commission's role in this proceeding is not merely to make a determination as to whether competition currently exists; rather, it must make certain that competition continues to exist, and that AT&T, having obtained reclassification, does not use its not-inconsiderable market power to undo competitive inroads. While VoIP may not have figured into the Commission's actual technical assessment of whether services are available from more than one provider, Staff considers that VoIP was obviously and expressly figured into the Commission's decisional calculus regarding competition going forward.

AT&T attempts to interpose a number of Illinois statutes as prohibitions against the Commission's DSL requirement. It argues first that Section 13-517 prohibits the Commission from ordering a carrier to provide DSL to more than 80% of its customers. It argues that the Commission's only authority under Section 13-517 is to grant waivers to those ILECs that show statutorily cognizable cause why they should not be required to comply with the requirement.

Staff sees this argument as an attempt to impose a limitation where none exists. First, under the provision itself, ILECs are required to provide advanced services to "not less than 80%" of their customers, 220 ILCS 5/13-517, leaving open the possibility that other regulatory requirements will impose a higher standard. Second, the limitation AT&T would have the Commission observe is to be found nowhere in the specific terms of the statute. AT&T wants the Commission to infer a limitation that is simply not there.

Staff notes that AT&T next relies upon the Cable and Video Competition Law of 2007, 220 ILCS 5/21-100, et seq., for the proposition that the Commission has no authority to require AT&T to provide broadband service to more than 90% of its customers. It argues that the Video Law, by its terms: (a) requires a licensee under the Law that are otherwise a telecommunications carrier serving more that 1 million access lines to make broadband service available to 90% of its customers with broadband service or pay a fine; and (b) specifically limits the Commission's authority under the Video Law to reviewing applications for licenses under the Video Law for deficiencies in the statutorily required formal representations and disclosures.

Staff agrees that AT&T correctly characterizes the terms of the Video Law of 2007, insofar as this matters, which is not at all. The Staff agrees that, were this a matter in which AT&T was acting as a licensee under the Video Law of 2007, the

Commission would indeed have no authority to require the Company to make broadband service available to any more than 90% of its customers. However, in this proceeding, Staff notes that AT&T does not seek relief from the Commission in its capacity as a licensee under the Video Law of 2007; rather, it seeks relief under Section 13-502 in its capacity as a provider of competitive and non-competitive telecommunications service. Thus, according to Staff, the Video Law is irrelevant to the discussion.

Staff observes that AT&T next contends that the High Speed Internet Services Act and Information Technology Act, 20 ILCS 661/1 *et seq*., prohibits the Commission from imposing its DSL requirement. According to AT&T, Section 25 of the High Speed Internet Services Act constitutes a limitation of authority upon all state actors to impose broadband requirements.

Staff urges the Commission to reject this argument. Staff notes that the High Speed Internet Services Act is basically an exercise in governmental fact-finding and planning: it creates a structure under which the Illinois Department of Commerce and Economic Opportunity (DCEO) partners with a qualified not-for-profit entity for the purpose of developing a statewide high speed internet deployment strategy, with a focus on ensuring statewide access to high speed internet service and encouraging investment in the same. 20 ILCS 661/15(a)(1), (4). The not-for-profit entity is to identify unserved or underserved areas, and develop regional plans for serving such areas, as well as encouraging investment in the necessary facilities. 20 ILCS 661/20. The High Speed Internet Services Act provides that it does not afford the not-for-profit entity, DCEO, or other entities: "any <u>additional</u> authority, regulatory or otherwise, over providers of telecommunications, broadband, and information technology[.]" 20 ILCS 661/25 (emphasis added).

Accordingly, insofar as this provision has any application to the Commission, Staff sees it as merely stating that the High Speed Internet Services Act affords the Commission no authority that it does not already possess. This is a matter clearly not at issue in this proceeding, inasmuch as the Commission is not seeking to invoke this Act in any way. Accordingly, this argument should be dismissed as well.

4. <u>Federal Preemption</u>

Staff hears AT&T to argue that federal law preempts the Commission from imposing the DSL requirement. AT&T's basis for this assertion is its understanding that the FCC has, by the terms of certain of its orders, exerted exclusive federal jurisdiction over information services. According to AT&T, the FCC has accomplished this by classifying wireline broadband Internet access service provided over a provider's own facilities as an information service subject to FCC jurisdiction. AT&T also refers the Commission to the FCC's Vonage Preemption Order for the proposition that state regulation of any aspect of information services is preempted. Staff considers these assertions meritless.

Staff observes that a concise recitation of the law of preemption is warranted here, and one such is found in the Illinois Appellate Court's decision in Spitz v. Goldome Realty Credit Corp., which states that:

> The supremacy clause of the United States Constitution provides "[the] Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; * * * any thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI.) Under this clause, Congress has the power to preempt any legislative field over which it has jurisdiction. [citation]. **Preemption exists only where there is a "clear and manifest purpose of Congress" to foreclose a particular field to State legislation.** [citation]. That purpose may be expressly stated or may be inferred where "the scheme of federal regulation is sufficiently comprehensive" to make reasonable the assumption that Congress has left no room for supplementary State regulation. [citation]. Also, if the Federal legislation touches a field in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws" in the same field, preemption may be inferred. [citation].
>
> Even if Congress has not foreclosed a legislative field from State regulation, preemption exists if there is an actual conflict between a State statute and Federal legislation. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" [citation], or where the State statute acts as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress". [citation]. **However, when Federal law preempts State law, it does so only to the extent necessary to protect the achievement of Federal goals.** [citation]
>
> Spitz v. Goldome Realty Credit Corp., 210 Ill. App. 3d 215, 218-19; 569 N.E.2d 43, 45-6; 1991 Ill. App. Lexis 218 at 5-7; 155 Ill. Dec. 43 (1st Dist. 1991) (emphasis added)

Here, notes Staff, a state requirement that AT&T build certain facilities or provide certain services in its service territory is simply not preempted. First, and rather obviously, observes Staff, a Commission requirement that AT&T make DSL service available in its service territory is not in any way inconsistent – in fact, it is squarely consistent – with express federal goals. Section 706 of the federal Telecommunications Act of 1996 provides in relevant part that:

> The Commission and each state commission with regulatory jurisdiction over telecommunications services **shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans** (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation,

> regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that **remove barriers to infrastructure investment.** (emphasis added)
>
> 47 U.S.C. §157 n. 1

Staff states that it is self evident that Section 706 does not expressly preempt state broadband initiatives; instead, it: (1) expresses, in no uncertain terms, a federal policy of widespread deployment of broadband services; and (2) directs the FCC and state Commissions to remove barriers to investment and entry. The "clear and manifest purpose" expressed by statute is not to foreclose state regulation; rather, the statute specifically delineates a role for state Commissions.

Further, in Staff's opinion, the Commission's DSL requirement is squarely consistent with these policies. Certainly, it does not impose any sort of barrier to investment or entry. Indeed, it directs needed investment in broadband facilities. Thus, even if the Commission's order is subject to implicit preemption, such implicit preemption attaches only to the extent that it is necessary to protect achievement of federal goals, which is to no extent at all.

Staff sees this proposition as amply demonstrated by the industry's – and more specifically AT&T's – complete acquiescence in the application and enforcement of Section 13-517 of the Illinois Public Utilities Act, 220 ILCS 5/13-517. This enactment requires each incumbent carrier to deploy advanced services to at least 80% of its customers. 220 ILCS 5/13-517(a). No carrier, including AT&T, has, to Staff's knowledge, argued that this provision is preempted by federal law. Thus, AT&T's position reduces itself to the assertion that federal law does not preempt an 80% broadband requirement, but does preempt a 99% requirement. Surely, there is no principled basis to assert that one state requirement is federally preempted but the other is not. Accordingly, Staff urges that AT&T's position be rejected.

AT&T's reliance on the FCC's *Memorandum Opinion and Order*, In the Matter of Vonage Holdings Corporation: Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, FCC No. 04-0267, WC Docket No. 03-211 (Rel. November 12, 2004) (hereafter "Vonage Holdings Order") is also in Staff's opinion misguided. There, according to Staff, the state of Minnesota sought to impose certain state requirements upon a VoIP provider, including requiring the provider to obtain operating authority, file tariffs, and provide and fund 911 emergency services. Vonage Holdings Order, ¶10. The FCC preempted Minnesota's state requirements, observing that such requirements undoubtedly imposed rather stringent barriers to entry by the VoIP provider. Vonage Holdings Order, ¶21.

Here, no such conditions obtain. Far from imposing barriers to entry, as was the case in *Vonage Holdings*, the Commission is, in this case, requiring entry. The Commission is, again, not impeding but furthering federal policy. As such, federal preemption simply does not attach.

In summary, the Staff recommends that the Commission reject AT&T's arguments on rehearing and sustain its June 11, 2009 Order in its entirety. The DSL requirements are supported by evidence and logic, are authorized by state law, and are not federally preempted.

IV. POSITION OF THE ATTORNEY GENERAL

The People of the State of Illinois, by Attorney General Lisa Madigan ("AG"), support the adoption of the broadband condition by the Commission. The AG presented legal analysis showing that federal law authorizes state commissions to promote high speed Internet access, particularly in the context of state deregulatory action. See 47 U.S.C. §1302(a).

The AG further argues that AT&T was required by the Federal Communications Commission to provide broadband access to 100% of the residential living units in its service area by December 31, 2007 as a condition – accepted without reservation by AT&T -- for the FCC's approval of the merger between AT&T and Bell South in December, 2006. In the Matter of AT&T Inc. and Bell South Corporation, Application for Transfer of Control, FCC 06-189, WC 06-74, Appendix F (Dec. 29, 2006), attached as AG Rhg Exhibit 1. The AG pointed out that the record showed that AT&T Illinois and its affiliates provide wireline service (e.g. DSL) to substantially less than 85% of the residential customers in the Greater Illinois LATAs, raising concern about both consumers' access to VoIP and their ability to bundle local telephone and Internet service in these areas.

The AG argued that while AT&T Illinois claimed that even exchanges without AT&T DSL service were "100% broadband capable" AT&T Illinois failed to identify or present any AT&T non-wireline Internet service that it offers consumers. The AG referred to AT&T Illinois Response to AG Data Request 8.5 and ICC Staff Data Request JZ 3.04, which included two links showing the Internet access services available in Illinois. The web site displays only wireline DSL and U-verse service. In response, AT&T Illinois asserted in its Reply Brief that consumers could type in their address and see a link to satellite service. The details of satellite service, "provided by WildBlue," are contained in AG Rhg Exhibit 5. The charges "start at around $55 per month. Plus, for $299, we'll deliver all the equipment you need." AG Rhg Ex. 1 at page 2 of 3. This can be compared to DSL service that ranges from $10.00 per month to $35 per month for speeds up to 6 megabits per second, and is significantly higher than the $41.55 "cost" AT&T Illinois identified as the cost to provide service to households in the Greater Illinois LATAs that currently lack service. Affidavit of Wardin, Attachment R-2. Satellite service cannot support the same services as DSL, i.e., VoIP, real-time online gaming, or VPN (virtual private network). AG Rhg Ex. 5 at 2 of 8. Further, consumers are only offered satellite service if they cannot obtain DSL service.

The AG noted that although the Commission did not include its rationale for importing the DSL build-out commitment made in the Chicago LATA case (Docket 06-0027) into the Greater Illinois LATAs, the importance of high speed Internet access to

the economic development of the State and consumers' interest in that service are matters of both state and federal public policy. See, e.g., 47 U.S.C. §1302 et seq.; 20 ILCS 661/5 ("The deployment and adoption of high speed Internet services and information technology has resulted in enhanced economic development and public safety for the State's communities, improved health care and educational opportunities, and a better quality of life for the State's residents."). The original record as well as the record on rehearing are adequate to justify Commission attention to AT&T Illinois's dismally low broadband deployment levels in the Greater Illinois LATAs.

The AG responded to AT&T Illinois's argument that because the Commission did not base its reclassification order on the existence of "over-the-top" VoIP service, the availability of broadband "has no bearing" on this case. Brief on Rehearing of AT&T Illinois at 12. The AG noted that AT&T Illinois ignores the testimony submitted by its own witness, who testified that 63% of Illinois consumers subscribe to broadband service, and that broadband is a key component of the telecommunications market. AT&T Illinois Ex. 3.1 at 18 The Commission properly conditioned the competitive classification of telephone services on the availability of DSL in the Greater Illinois LATAs.

In response to AT&T Illinois's argument that cable modem service is available in areas covering 99% of AT&T Illinois's access lines in the Greater Illinois LATAs, the AG pointed out that maps submitted by AT&T Illinois show substantial portions of some exchanges without cable modem service. ATT Illinois Ex. 1.0, Sch. WKW-11. The AG pointed out that AT&T Illinois evidently believes that consumers need not have a choice of AT&T Illinois-provided, wireline broadband, and that if cable modem is available in some parts of an exchange, it can assume that the entire exchange is served. However, Illinois Bell's own Schedule WKW-11 showed no cable modem service in portions of the following areas:

a. Rockford exchange in the Rockford LATA
b. Edgington exchange in the Davenport LATA
c. Ipava, Fiatt, Farmington, Trivoli, Hanna City, Peoria and Delavan exchanges in the Peoria LATA
d. Gibson City, Champaign Urb, Fithian and Oakwood in the Champaign LATA
e. Petersburg, Athens, and Riverton in the Springfield LATA
f. Edwardsville, Greenville, Mount Vernon, Kinmundy, Luka, Kell, Dix and Mount Vernon in the East St. Louis LATA.

The AG pointed out that the geographical expanse of the unserved areas varies, but assuming the accuracy of the maps provided by Mr. Wardin, there are sizable unserved areas, particularly in the Rockford exchange. More significantly, responses to data requests indicate that six of the areas that AT&T Illinois does not serve do not have ubiquitous cable modem service either.

The AG asserted that AT&T Illinois's neglect of a substantial portion of the Greater Illinois LATAs does not reflect the behavior of a company that is facing real competition for either telephone service (which can be bundled with cable modem service or provided as VoIP if adequate broadband is available) or broadband service.

The Commission's decision to condition the reclassification of residential service in the Greater Illinois LATAs on AT&T Illinois's deployment of broadband was properly based on the expectation that competition requires the provision of all telecommunications services. The AG argued that even if there is cable modem service in some of the areas that do not have DSL service, AT&T Illinois is effectively abandoning customers who want broadband service and leaving them with only one wireline broadband service provider. This is not how a competitive market should operate, and is inconsistent with the General Assembly's expectation that competition will develop in the telecommunications industry.

In response to AT&T Illinois's argument that the price tag of $38.3 million to bring broadband service to 90% of Greater Illinois LATA residential customers is too costly, the AG pointed out that AT&T Illinois can be expected to receive between $28 and $35 million more from the same consumers using the same services and will save about $5.7 million due to lost rate reductions under alternative regulation. AG Ex. 1.0 at 10. Further, the AG noted that AT&T Illinois, as a whole, reported Total Operating Revenue and Net Operating Revenues of $3.35 billion and $761 million for 2007, respectively, constituting a 20.40% return on equity. AT&T Illinois Ex. 7.0 at 6, 9. The Company reports earnings on a statewide basis – it does not disaggregate its operations into LATAs. AG Ex. 3.0 at 7. Further, "at least as far back as 2004, total company returns were higher than jurisdictional Illinois intrastate returns," indicating that interstate services such as broadband service (which is classified as "interstate") are producing very favorable returns to AT&T Illinois and its affiliates on an aggregate basis. AG Ex. 3.0 at 7, 8-14. The investment necessary to bring the six Greater Illinois LATAs into the twenty-first century is insignificant against the overall revenues and profitability of the Company. In addition, AT&T Illinois could expect to both receive revenues from broadband customers and to *retain* customers if it could bundle broadband service with other services, such as local, long distance, and wireless telephone service.

The AG argues that the purportedly higher costs associated with expanding wireline high speed Internet service in the Greater Illinois LATAs should be considered in light of the Company's overall cost and pricing strategy. The AG asserts that AT&T Illinois is not made up of fiefdoms of little companies each of which must independently support all local costs. Rather, AT&T Illinois has substantial high density, low-cost service territory, but the rates it charges across the state are the same. AT&T Illinois has not lowered the prices of broadband service in those parts of the Chicago LATA that have extremely low cost and high density, and it is unreasonable to suggest that it is "burdensome" to invest in the less dense areas because those areas, without reference to price and cost averaging, are too costly to serve. This approach is unfair to non-urban consumers and is contrary to the goals of universal service, which require that costs and prices be averaged so that all consumers have both access to the system, and the ability to call others on the system – even those in remote areas.

By arguing that unserved Greater Illinois LATA customers must cover the entire cost of serving them, without reference to the rest of the Company, the other parts of the Greater Illinois LATAs, or the surplus revenue received to serve low-cost customers, AT&T Illinois is disregarding and undermining the goals of universal service that underpin both federal and state law. See, e.g., 47 U.S.C. §254; 220 ILCS 5/13-102, 13-301.

The AG states that a more reasonable assessment of cost would aggregate costs and revenues within all competitive LATAs recognizing that investment in broadband will help retain customers because broadband is part of the competitive market. Similarly, the costs and revenues from all AT&T Illinois high speed Internet customers should be aggregated to determine the overall return on investment. By isolating cost recovery to only currently unserved customers, AT&T Illinois overstates the cost to new customers, and ignores the economies of scale inherent in utility service.

The AG added that even assuming that AT&T Illinois will need to spend $38.3 million to serve 90% of the residential customers in the Greater Illinois LATAs and provide service in 99% of the wire centers, the evidence in the original record demonstrated that when AT&T Illinois raises its prices in the Greater Illinois LATAs to match the price increases in the Chicago LATA (as of November, 2008), it will take only three years for AT&T Illinois to generate between $28 and $35 million more from the same consumers using the same services, while AT&T Illinois will save about $5.7 million due to lost rate reductions under alternative regulation. AG Ex. 1.0 at 10. The AG asserts that AT&T Illinois does not shirk from taking more money out of the Greater Illinois LATAs in the form of higher rates, but shudders at the thought of reinvesting it back into the community to improve both access to and choice for high speed Internet service. The Commission should make an independent evaluation of whether the $38.3 million that AT&T Illinois has identified as the cost of complying with its order is unreasonable, or is necessary to promote the public interest in light of the price consumers will pay as a result of price deregulation. If prices are to be treated as competitive, it is only appropriate that consumers have choice for both telephone and broadband services (including the option to choose AT&T Illinois or VoIP).

The AG takes issue with AT&T Illinois's argument that the "low" density of the Greater Illinois LATAs makes DSL deployment uneconomical. According to AT&T Illinois Ex. 1.0, Sch. WKW-11, other ILECs and service providers, including small ILECs such as MidCentury Telecom, have made broadband service available to a larger percentage of households than AT&T Illinois, despite having significantly lower density than AT&T Illinois. Density of 136 households per square mile, particularly in a company with average density significantly higher, should not be an obstacle to ubiquitous broadband deployment. Even in the Rockford exchange in the Greater Illinois LATA with density close to that of the Chicago LATA, however, AT&T Illinois has not offered and does not plan to expand the reach of its wireline, high speed Internet service. The AG asks: Why are customers in the Rockford exchange denied the choice of high speed Internet access by AT&T Illinois when the density of that exchange is very close to the density of the Chicago LATA area?

The AG asserts that the need for Commission action is highlighted by a review of AT&T Illinois's limited plans for broadband expansion. Currently, a significant fraction of Greater Illinois LATA households do not have access to Illinois high speed Internet service, with the percentages varying by LATA. Responses to data requests indicate that AT&T projects only a small amount of growth in the percentage of its customers will have broadband service on October 30, 2010. The AG notes that the Company has produced no plans for broadband expansion beyond October 30, 2010.

The AG argued out that the deployment level in the Greater Illinois LATAs is significantly lower than it was in the Chicago LATA. This indicates that those consumers do not have the choice for broadband or for bundling that consumers in the Chicago LATA had. If the market for the Chicago LATA and the Greater Illinois LATAs are to be considered comparable, the level of broadband availability and choice in the Greater Illinois LATAs needs to increase to the levels mandated in the Order issued on June 11, 2009 and amended on June 24, 2009.

The AG asserted that in light of the significance of broadband service as a facilitator of competition (a factor upon which AT&T Illinois relied as support for its contention that consumers in the Greater Illinois LATAs have a choice among alternative residential service providers), it is not surprising nor is it inappropriate for the Commission to consider AT&T Illinois's (or an affiliate's) provision of broadband to consumers in the Greater Illinois LATAs. The telecommunications services market includes broadband service as well as local telephone service. The Commission's Order conditioning its acceptance of AT&T Illinois's reclassification of its Greater Illinois LATAs residential service as competitive on the widespread availability promotes the goal of universal and competitive broadband service, and is an appropriate pre-condition to the price deregulation that accompanied the competitive classification. The AG concluded that in the absence of compliance with the broadband mandate, the Commission should reverse AT&T Illinois's competitive classifications approved in this docket.

V. POSITION OF CUB

CUB notes that this proceeding was initiated to investigate the propriety of AT&T Illinois Telephone Company's reclassification of most residential retail services outside the Chicago area as competitive. This proceeding follows closely on the heels of AT&T's competitive reclassification of residential local services in the Chicago area (MSA-1), which was approved by the Commission in ICC Docket No. 06-0027. In that proceeding, the Commission conditioned its approval of AT&T's competitive reclassification of residential local services in MSA-1 on the fulfillment of certain commitments AT&T made in a Stipulation and Joint Proposal ("Stipulation") with CUB. These commitments included caps on network access and usage rates and offering the Consumer's Choice packages at the same rate as in MSA-1, each for four years from the date of the Commission's final Order[5]. AT&T further agreed to provide various bill

[5] These commitments were extended one year based on an agreement between the AT&T, CUB and the AG in July 2008.

messages and inserts and to submit to an automatic Commission investigation of rate increases for the Consumer's Choice packages after the rate freeze period if the increase exceeds the increase in the consumer price index for local landline telephone charges for the previous year, plus 2 percent.

As part of the Stipulation, AT&T Illinois also agreed to install high-speed Digital Subscriber Line ("DSL") Internet service to 99% of the wire centers it operates in the Chicago LATA within one year. In addition, AT&T promised to make DSL available to 90% of the total customer living units in its territory within MSA-1. CUB believes AT&T has satisfied this commitment in MSA-1. In its Initial Brief in this docket, CUB argued that "increasing the provisioning of broadband service expands the scope of customers who have the option of selecting VoIP as a telecommunications service if they choose it. AT&T did not make these commitments in seeking reclassification of residential local exchange services in the Greater Illinois MSAs." CUB Init. Br. at 13.

In its June 11, 2009 Order in the instant docket, the Commission agreed with CUB and Staff of the Illinois Commerce Commission ("Staff") that AT&T's commitments in this proceeding – including capping measured service rate increases and offering the three Consumer's Choice packages at the same price for four years -- did not fully address concerns that consumers will be adequately protected from future rate increases and did not mirror the commitments AT&T made in the MSA-1 proceeding. Order at 96. The Commission therefore imposed additional bill notifications and reporting requirements on AT&T in order to provide the Greater Illinois MSAs symmetry with MSA-1, and required AT&T to provide meaningful and effective marketing plans in order to inform customers of the safe harbor packages. Order at 96. The Commission concluded: "[w]e believe it to be an important transitional mechanism that consumers in the Greater Illinois LATA[s] be afforded those same MSA-1 protections." *Id*.

The Commission also required AT&T to expand the availability of DSL to 99% of the wire centers it operates and 90% of the total customer living units in the Greater Illinois MSAs within one year, ("DSL Requirements"), in order to mirror the Stipulation in MSA-1 and provide customers in the Greater Illinois MSAs with the same protections and provisions applicable to MSA-1. It is this requirement for which AT&T seeks rehearing and reversal. As argued below, AT&T's legal and policy arguments to eliminate the DSL Requirements are unfounded and should be rejected. According to CUB, the Commission wisely and properly concluded that all AT&T customers deserve the same level of protection in a new world of the incumbent provider's largely unconstrained pricing flexibility.

CUB asserts that AT&T presents a variety of legal and policy arguments claiming that the Commission exceeded its authority and the scope of the proceeding by including the DSL Requirements. While AT&T is correct that the Commission only has the authority granted it by the legislature, (AT&T Br. on Rehrg. at 6), the provisions of the Public Utilities Act ("PUA") cited by AT&T do not limit the Commission's authority over broadband deployment as AT&T claims.

CUB disagrees with AT&T's assertion that the Commission lacks authority under state law to impose the DSL Internet requirements. AT&T cites to Section 13-517 of the PUA, which requires providers of noncompetitive telecommunications service to provide "advanced telecommunications services to not less than 80% of its customers by January 1, 2005." 220 ILCS 5/13-517(a). CUB argues that this minimum requirement does not, however, restrict the Commission from imposing additional requirements to protect the public interest. In fact, considering whether sufficient consumer protections are in place to protect consumers from unconstrained market prices is the Commission's obligation under the law. Pursuant to the controlling statute that governs the Commission's determination of whether a reclassification is appropriate, the Commission is required to consider "other factors that may affect competition and the public interest that the Commission deems appropriate." 220 ILCS 5/13-502(c)(5). CUB argues that in light of the far-reaching and revenue enhancing implications of the competitive classification of nearly all AT&T's residential telephone services in State of Illinois, it is critical that the Commission ensures the same public interest protections are provided to customers in the Greater Illinois MSAs as those in MSA-1, including the DSL Requirements.

CUB responds to AT&T's claims that the DSL Requirements conflict with Article XXI of the Public Utilities Act regarding Cable and Video Competition. CUB notes that Section 21-1101le) of the PUA, details the "Requirements to provide video services" and is not applicable to the present facts. AT&T incorrectly characterizes this provision of the PUA as somehow defining the "broadband service obligation that the legislature deemed to be adequate and appropriate for AT&T Illinois." AT&T Br. on Rehrg. at 7. Section 21-1101 does no such thing. It merely delineates the broadband provisioning requirements for an entity seeking authorization to be "a holder of a cable service or video service authorization issued by the Commission." 220 ILCS 5/21-101.1. The Commission's DSL Requirements in the instant docket were imposed as a condition to a competitive classification of telecommunications services and therefore Section 21-1101 simply does not apply.

CUB argues that the Commission has expressly stated its policy favoring wide dissemination of advanced services in Section 13-103 of the PUA: "development of and prudent investment in advanced telecommunications services and networks that foster economic development of the State should be encouraged through the implementation and enforcement of policies that promote effective and sustained competition in all telecommunications service markets." 220 ILCS 5/13-103. This policy squarely supports the Commission's DSL Requirements. Thus, a conclusion that either Section 13-517 or 21-1101 of the PUA somehow limit the Commission's authority to impose the DSL Internet Requirements is unfounded and should be rejected.

CUB similarly asserts that AT&T claims that, because the Federal Communications Commission ("FCC") has defined DSL Internet service as an information service, the FCC has exclusive jurisdiction over such service and the "Commission is not free to dictate matters that lie with the FCC's exclusive jurisdiction."

AT&T Br. on Rehrg. at 9. CUB contends that AT&T's arguments should be dismissed for three reasons.

First, AT&T's broad conclusion that this Commission has no authority over any "information service" is mistaken. If that were the case, the PUA provisions cited above – specifically Sections 13-517 and 21-1101 – would be pre-empted by federal law and illegal. To the contrary, the Illinois General Assembly determined in its wisdom that the Commission should be provided the authority to impose and oversee the 80% DSL advanced services requirement in Section13-517.

Second, AT&T cites to the FCC's Order in *Vonage Holdings*[6] as supporting its preemption argument. AT&T Br. on Rehrg. at 10. As AT&T's brief recites, the FCC's Order in that case preempted state "economic, public-utility type regulation." *Id*. The Commission's DSL Requirements, however, do not impose "economic, public-utility type regulation" on the broadband service itself – only the requirement to deploy it. AT&T is free to price the DSL at its discretion.

Third, the controlling federal statute (Section 706 of the Telecommunications Act of 1996) specifically authorizes states to encourage broadband deployment through "price cap regulation, regulatory forbearance, [or] measures that promote competition in the local telecommunications market." 47 U.S.C. §1302(a). Thus, rather than pre-empting the DSL Requirements, federal law actually supports it.

CUB contends that the Commission's evaluation of the propriety of a competitive reclassification, it is required to consider factors that affect the public interest. 220 ILCS 5/13-502(c)(5). The Commission's stated desire to provide symmetry of the transitional mechanisms conditioning the wide pricing flexibility granted to AT&T between customers in the Chicago area and those in the more rural Greater Illinois MSAs represents the Commission's consideration of the public interest in sanctioning the competitive reclassification of nearly all AT&T's residential telecommunications services as competitive. See Order at 95-96. The Commission sensibly believes this symmetry is necessary to provide "important transitional mechanisms" to customers who will be vulnerable to rising telecommunications rates. *Id*.

CUB says that AT&T incorrectly argues that, in its Order, the Commission "expressly found that the availability of VoIP[7] had no bearing on the competitive classification." AT&T mischaracterizes the Commission's determinations with regard to VoIP. What the Commission actually found was that:

> Unlike the other competitive entry platforms, AT&T does not present evidence in this proceeding regarding VoIP provider competitive market shares and actual competitive market

[6] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22416-17, para 21 & nn. 77-79 (2004), p*etitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.32rd 570 (8th Cir. 2007).

[7] Voice over Internet Protocol

> penetration of VoIP providers. AT&T Illinois explicitly eschewed efforts to calculate an Illinois-specific or a Greater Illinois LATAs-specific market estimate of VoIP penetration. As a result, it is not possible for the Commission to meaningfully and accurately assess the actual level and role of VoIP competition for AT&T's services in the Greater Illinois LATAs.

Order at 91-92. Thus, the Commission could not consider VoIP, because AT&T failed to present sufficient evidence for review. The Commission's requirement to expand DSL availability to the Greater Illinois MSAs is ultimately - and properly - grounded in the desire to provide all AT&T customers with the same consumer protections.

AT&T claims the cost to meet the Commission's DSL Requirements would be approximately $38 million, and that this is overly burdensome and disproportionate to the relief granted by the Commission. Wardin Aff., at 4-6. However, CUB points out that AT&T's assessment of the costs of deploying DSL to 90% of wire centers and 99% of living units in the Greater Illinois MSAs does not consider the vast potential long-term profits it could expect as a result of the reclassification and resulting pricing flexibility granted by the Commission in this docket. In fact, the evidence in this proceeding shows that if AT&T raises its prices in the Greater Illinois LATAs to match the price increases in the Chicago LATA (as of November 2008), it will generate between $28 and $35 million additional revenue from the same customers using the same services and will save about $5.7 million due to lost rate reductions under alternative regulation in just three years. AG Ex. 1.0 at 10. It is not surprising the AT&T ignores these new revenues in presenting its financial assessment of the economic burden of broadband expansion. These additional revenues represent price increases to consumers for basic telephone service, therefore justifying the need for significant consumer protections, including the DSL Requirements.

AT&T witness Wardin argues that "the costs per-customer-served are lower where the size of the potential customer base in any geographic is large, and higher where the potential base is small." Wardin Aff. at 5. Mr. Wardin claims that the revenue AT&T would have to recover from customers subscribing to its broadband service in the Chicago LATA is $11.93, whereas the amount AT&T would have to recover from customer in the Greater Illinois LATAs is $41.55. *Id*. It is not surprising that the per-customer cost of broadband deployment is greater in a more rural area. However, by isolating the cost analysis in this way, AT&T overstates the cost to new customers in the Greater Illinois MSAs by ignoring the economies of scale of DSL deployment in its entire service area, and understates the effect of the reclassification and additional revenue gained from the provisioning of advanced services on its future revenues. Simply put, the cost of the DSL Requirements cannot be viewed in a vacuum. Furthermore, considering the rate flexibility AT&T has gained through the reclassification, the public interest is best served by broadening the scope of services available to customers in the Greater Illinois MSAs and providing symmetry with AT&T customers in MSA-1.

CUB concludes that it is lawful, reasonable, and in the public interest to condition price deregulation of AT&T residential services on the expansion of DSL service in the Greater Illinois MSAs. This requirement is necessary to provide customers in the Greater Illinois MSAs with the same consumer protections granted by the Commission in the MSA-1 proceeding.

VI. COMMISSION ANALYSIS AND CONCLUSION

Based on the record developed in this proceeding, we conclude that the DSL Internet Requirements imposed on AT&T Illinois in our order dated June 11, 2009, as amended June 24, 2009, should be removed. On balance, we conclude there is insufficient evidentiary basis for imposition of this obligation in this proceeding.

The Commission's approach in this reclassification proceeding has been to analyze the level of competition that actually exists. Consistent with this approach, the Commission found that both AT&T Illinois' package and measured service offerings in the Greater Illinois LATAs were properly classified as competitive based on CLEC, cable and wireless competition. We did not rely upon evidence concerning the actual competitive penetration of VoIP services, because AT&T failed to present such specific evidence in this record. This is significant because the availability of broadband service is most directly relevant to this docket to the degree it facilitates pure-play VoIP options for customers.

The Commission intended that imposition of the DSL Internet Requirement in this proceeding would help lead to a competitive environment in the Greater Illinois LATAs more closely matching that which exists in MSA-1. The Commission recognizes, however, that the DSL expansion AT&T committed to in that proceeding was part of AT&T's agreement with the Citizens Utility Board ("CUB"). That DSL expansion was not presented to the Commission for its approval, and was not part of the Commission's decision to approve the MSA-1 competitive classification. AT&T has also shown on rehearing that costs and other aspects of a DSL Internet Requirement in the Greater Illinois LATAs differ from those in the Chicago MSA, which is consistent with our conclusion that while reclassification is appropriate, sustainable effective competition is less certain in the Greater Illinois LATAs than in MSA-1.

There was considerable debate among the parties concerning the Commission's authority to impose such an obligation on AT&T Illinois. We do not agree with AT&T that state law prohibits the imposition of the DSL requirement. As Staff points out, AT&T seeks relief here as a telecommunications provider, rather than a provider of video and cable services. Thus, AT&T's status as a licensee under Illinois' Cable and Video Competition Law of 2007 is not relevant to this proceeding. Similarly, AT&T is incorrect in asserting that Illinois' High Speed Internet Services Act and Information Technology Act prohibits imposition of the DSL requirement.

Nor do we agree with AT&T that we are preempted by federal law from imposing the DSL requirement. Section 706 of the Telecommunications Act of 1996, and the

American Recovery and Reinvestment Act both reflect and endorse a public policy favoring broadband deployment. Neither of these enactments specifically prohibits imposition of a DSL build out requirement by this Commission. Similarly, the FCC's Vonage Holdings decision likewise has no preemptive effect applicable to the DSL Internet Requirement. This FCC decision preempts state requirements creating barriers to entry by VoIP providers. The DSL requirement at issue in this case would create no such barrier to entry and would not frustrate or impede the federal policy of encouraging entry by VoIP providers.

Finally, we emphasize that the Commission fully supports federal and state policies promoting the availability of broadband Internet access services. We seek to further this broad public policy objective. However, this overarching policy goal does not warrant imposing the DSL Internet Requirement in this proceeding where the record does not contain adequate evidentiary support for imposition of this specific requirement.

VII. FINDINGS AND ORDERING PARAGRAPHS

The Commission, being fully advised in the premises, is of the opinion and finds that:

(1) Illinois Bell Telephone Company ("AT&T Illinois") is an Illinois corporation engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act (the "Act");

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding pursuant to the Act;

(3) the recitals of facts and law and conclusions reached in the prefatory portion of this Order are supported by the evidence in the record, and are hereby adopted as findings of fact and law;

(4) with respect to the residential services classified by AT&T Illinois as competitive in its August 1 and September 15, 2008 tariff filings, the same services, their functional equivalent, or substitute services are reasonably available to residential customers in each of the Greater Illinois LATAs from more than one provider, as the Commission found in its Order dated June 11, 2009, as amended on June 24, 2009, and are properly classified as competitive;

(5) the DSL Internet Requirements imposed on AT&T Illinois in that Order are removed.

IT IS THEREFORE ORDERED that the residential services classified by AT&T Illinois as competitive in its August 1 and September 15, 2008 tariff filings shall remain classified as competitive.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Act and 83 Ill. Admin. Code 200-880, this Order is final; it is not subject to the Administrative Review Law.

DATED: October 30, 2009
BRIEFS ON EXCEPTIONS DUE: November 17, 2009
REPLY BRIEFS ON EXCEPTIONS DUE: November 24, 2009

Terrance A. Hilliard
Administrative Law Judge